Supreme Court, U.S.
FILED

9714 27 FEB 26 1998

OFFICE OF THE CLERK

No. 97-___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

JUDICIAL COUNCIL OF THE FIFTH JUDICIAL CIRCUIT AND JERRY BUCHMEYER, CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS,

Petitioners,

v.

JOHN H. MCBRYDE, DISTRICT JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

THOMAS B. ALLEMAN

WINSTEAD SECHREST & MINICK P.C.
5400 Renaissance Tower
1201 Elm Street
Dallas, Texas 75270
(214) 745-5103

Counsel for Petitioner Jerry Buchmeyer, Chief Judge of the United States District Court for the Northern District of Texas

ROBERT B. FISKE, JR.
Counsel of Record
LOWELL GORDON HARRISS

DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, N.Y. 10017
(212) 450-4000

Counsel for Petitioner The Judicial Council of the Fifth Judicial Circuit

February 26, 1998

98 PP

Questions Presented

1. When an Article III judge has engaged in "misconduct" detrimental to the effective administration of justice in Article III courts, may the Judicial Branch rectify the adverse effects thereof under the broad authority of circuit judicial councils to "make all necessary and appropriate orders for the effective and expeditious administration of justice" under 28 U.S.C. § 332(d), or under 28 U.S.C. § 137, or is 28 U.S.C. § 372(c) the exclusive means to attempt to rectify such adverse effects?

2. Is assumed injury to reputation sufficient "injury in fact" under Article III to give a federal judge standing to seek relief in federal court from an order of a circuit judicial council?

Parties to the Proceeding

The following were parties to the proceeding in the Fifth Circuit as to which certiorari is sought:

1. Honorable John McBryde, United States District Judge, Northern District of Texas.

2. Honorable Jerry Buchmeyer, Chief Judge, United States Court, Northern District of Texas.

3. The Judicial Council of the Fifth Circuit as of October 20, 1995:

a. Honorable Henry A. Politz, Chief Judge, Fifth Circuit Court of Appeals

b. Honorable William H. Barbour, Jr., District Judge, Southern District of Mississippi

c. Honorable Fortunado Benavides, Circuit Judge, Fifth Circuit Court of Appeals

d. Honorable Norman Black (deceased), Chief Judge, Southern District of Texas

e. Honorable Howell Cobb, District Judge, Southern District of Texas

f. Honorable W. Eugene Davis, Circuit Judge, Fifth Circuit Court of Appeals

g. Honorable E. Grady Jolly, Circuit Judge, Fifth Circuit Court of Appeals

h. Honorable Robert M. Parker, Circuit Judge, Fifth Circuit Court of Appeals

i. Honorable Frank Polozola, District Judge, Middle District of Louisiana

j. Honorable Edward Prado, District Judge, Western District of Texas

k. Honorable Barefoot Sanders, District Judge, Northern District of Texas

l. Honorable Morey Sear, District Judge, Eastern District of Louisiana

m. Honorable L.T. Senter, District Judge, Norther District of Mississippi

n. Honorable Jerry Smith, Circuit Judge, Fifth Circuit Court of Appeals

o. Honorable Carl Stewart, Circuit Judge, Fifth Circuit Court of Appeals

p. Honorable Donald Walter, District Judge, Western District of Louisiana

q. Honorable Jacques Wiener, Circuit Judge, Fifth Circuit Court of Appeals

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Parties to the Proceeding	ii
Table of Authorities	vii
Opinion and Orders Below	2
Jurisdiction	2
Statutes Involved	2
Statement of the Case	4
A. The Origin and Present Statutory Structure of Judicial Governance	4
1. The 1939 Act	4
2. The 1948 Recodification	6
3. The 1980 Act	6
4. The 1990 Act	7
B. The Transferred Cases	8
1. Petitioner Buchmeyer's Orders	9
2. Respondent McBryde's Request to the Judicial Council for Assistance	10
3. The Judicial Council Order	10
C. The Decision of the Fifth Circuit	12
REASONS FOR GRANTING THE WRIT	12

PAGE

I. There Is No Implied Limitation on the Authority of the Judicial Branch to Address Judicial "Misconduct" Under Section 332(d)(1) or Section 137, and the Decision Below Conflicts with Prior Decisions of this Court, with the Plain Meaning of the Statute, and with the Administrative Needs of the Judicial Branch 14

II. Assumed Injury to a Federal Judge's "Reputation" Does Not Constitute Article III Standing to Challenge a Judicial Council Order in Federal Court . . 22

CONCLUSION 26

APPENDICES

A. Opinion of the Court of Appeals 1a

B. Order of the Judicial Council of the Fifth Circuit 55a

C. Orders of Chief Judge Buchmeyer 58a

D. Order of the Court of Appeals Denying Rehearing 60a

PAGE

TABLE OF AUTHORITIES

Cases

Allen v. Wright, 468 U.S. 737 (1984) 22, 24
Board of Regents v. Roth, 408 U.S. 564 (1972) 23
Chandler v. Judicial Council of the Tenth Circuit of the United States, 398 U.S. 74 (1970) 4, 6, 17, 20
County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251 (1992) ... 16
Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987) 16
Ex Parte Hennen, 38 U.S. 230 (1839) 9
FAA v. Robertson, 422 U.S. 255 (1975) 16
Flast v. Cohen, 392 U.S. 83 (1968) 24
Hilbert v. Dooling, 476 F.2d 355 (2d Cir. 1973) 23
Jimenez v. Aristeguieta, 311 F.2d 547 (5th Cir. 1962). 23
Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982) 16
Liteky v. United States, 510 U.S. 540, 554 (1994) 23
Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 22, 23, 24
Martinez v. Winner, 771 F.2d 424 (10th Cir.), *modified on other grounds*, 778 F.2d 553 (10th Cir. 1985), *vacated on other grounds*, 475 U.S. 1138 (1986) .. 19
Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555 (1963) 16
Morton v. Mancari, 417 U.S. 535 (1974) 16
Paul v. Davis, 424 U.S. 693 (1976) 14, 23, 24
Posadas v. National City Bank, 296 U.S. 497 (1936) . 16
Raines v. Byrd, 117 S. Ct. 2312 (1997) 22
Richardson-Merrell, Inc. v. Koller, 472 U.S. 424 (1985) 13, 15, 18, 19

PAGE

Rodriguez v. United States, 480 U.S. 522 (1987) 16
Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) .. 16
Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 38 (1976) 24
Torres v. Trinity Indus., Inc., CA 4:90-812-A (N.D. Tex.) ..... *passim*
United States v. Satz, No. 4:94-CR-094-R (N.D. Tex.) ..... *passim*
United States v. United Continental Tuna Corp., 425 U.S. 164 (1976) 16
Utah-Idaho Sugar Co. v. Ritter, 461 F.2d 1100 (10th Cir. 1972) 23
Vimar Sequros Y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528 (1995) 16
Warth v. Seldin, 422 U.S. 490 (1975) 24
Watt v. Alaska, 451 U.S. 259 (1981) 16
White Motor Corp. v. Citibank, N.A., 704 F.2d 254 (6th Cir. 1983) 23

Constitutional Provisions, Statutes & Rules

U.S. Const., art. III ..... *passim*
28 U.S.C. § 137 ..... *passim*
28 U.S.C. § 332(d) ..... *passim*
28 U.S.C. § 372(c) ..... *passim*
28 U.S.C. § 753 9
28 U.S.C. § 1254(1) 2
28 U.S.C. § 1651(a) 2, 25
28 U.S.C. § 2101(c) 2
28 U.S.C. § 2106 ..... 23, 24
Administrative Office Act, 53 Stat. 1223 (1939) 5, 17

PAGE

Judicial Councils Reform and Judicial Conduct and Disability Act, Pub. L. No. 96-458, 94 Stat. 2035 (1980) 6, 17, 18
Judicial Improvements Act, Pub. L. No. 101-650, 104 Stat. 5089 (1990) 7-8, 18
D.C. Circuit Rules Governing Complaints of Judicial Misconduct or Disability, Rule 2, Commentary . . . 20
Third Circuit Rules Governing Complaints of Judicial Misconduct or Disability, Rule 2, Commentary . . . 20
Sixth Circuit Rules Governing Complaints of Judicial Misconduct or Disability, Rule 2, Commentary . . . 20
Ninth Circuit Rules Governing Complaints of Judicial Misconduct or Disability, Rule 2, Commentary . . . 20
Northern District of Texas Special Order No. 3-130 . . 19

Other Authorities

Administrative Office of the United States Courts, *Judicial Business of United States Courts* (1994) . . 21
Administrative Office of the United States Courts, *Statistical Tables for the Federal Judiciary* (1995) . 21
Annual Report of the Director of the Administrative Office of the United States Courts — 1960 (1961) . 21
Geyh, *Informal Methods of Judicial Discipline*, 142 U. Pa. L. Rev. 243 (1993) 21
Hearings on H.R. 2973, H.R. 5999 before the Committee on the Judiciary of the House of Representatives, 76th Cong., 1st Sess. (March 2 & April 15, 1939) . 5
Hearing on S. 188 before a Subcommittee of the Senate Committee on the Judiciary, 76th Cong., 1st Sess. (April 4 & 5, 1939) 6, 17
H.R. Rep. No. 101-512, 101st Cong., 2d Sess. (1990) . 8
H.R. Rep. No. 96-1313, 96th Cong., 2d Sess. (1980) . 7, 17

PAGE

H.R. Rep. No. 308, 80th Cong., 1st Sess. (1947) 6
Lumbard, *The Place of the Federal Judicial Councils in the Administration of the Courts*, 47 A.B.A. J. 169 (1961) 14
Proceedings of the Attorney General's Conference on Court Congestion and Delay in Litigation (1958) .. 14
Report on the Powers and Responsibilities of the Judicial Councils, H.R. Doc. No. 201, 87th Cong., 1st Sess. (1961) 15
S. Rep. No. 426, 76th Cong., 1st Sess. (1939) 5, 17

No. 97-___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

JUDICIAL COUNCIL OF THE FIFTH JUDICIAL CIRCUIT AND JERRY BUCHMEYER, CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS,
Petitioners,

v.

JOHN H. MCBRYDE, DISTRICT JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit (Higginbotham, Garza, and Dennis, *JJ.*). The Court of Appeals issued a writ of mandamus to petitioner Buchmeyer, Chief Judge of the United States District Court for the Northern District of Texas, nullifying an order of petitioner Judicial Council of the Fifth Judicial Circuit ("Judicial Council") entered pursuant to 28 U.S.C. § 332(d)(1). The judgment below, reversing an order of petitioner Judicial Council, presents substantial questions concerning the congressional structure for governance of the Judicial Branch, the allocation of responsibility between judicial councils and Article III courts over decisions concerning the effective and expeditious

administration of justice within the circuits, and the constitutional standing of an Article III judge to initiate litigation in federal court against the Judicial Branch.

Opinion and Orders Below

The opinion of the Court of Appeals is reported at 117 F.3d 208 (5th Cir. 1997), and is set forth in the Appendix (1a-54a). The order of the Court of Appeals denying rehearing or rehearing *en banc* is not reported and is set forth in the Appendix (60a-61a). The order of the Judicial Council is not reported and is set forth in the Appendix (55a-57a). The orders of Judge Buchmeyer are not reported and are set forth in the Appendix (58a-59a).

Jurisdiction

The judgment of the Court of Appeals was entered on July 2, 1997. A petition for rehearing with a suggestion for rehearing *en banc* was denied on December 1, 1997. The Court of Appeals asserted that its jurisdiction was conferred by 28 U.S.C. § 1651(a). The jurisdiction of this Court to review the judgment of the Court of Appeals by writ of certiorari is conferred by 28 U.S.C. §§ 1254(1), 2101(c).

Statutes Involved

Section 332(d)(1) and (2) of Title 28 provide in pertinent part:

> "(d)(1) *Each judicial council shall make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit* . . . . Each council is authorized to hold hearings, to take sworn testimony, and to issue subpoenas and subpoenas duces tecum.

(2) *All judicial officers and employees of the circuit shall promptly carry into effect all orders of the judicial council.* In the case of failure to comply with an order made under this subsection or a subpoena issued under section 372(c) of this title, a judicial council or a special committee appointed under section 372(c)(4) of this title may institute a contempt proceeding in any district court in which the judicial officer or employee of the circuit who fails to comply with the order made under this subsection shall be ordered to show cause before the court why he or she should not be held in contempt of court." (Emphasis added.)

Section 372(c)(1) of Title 28 provides:

"Any person alleging that a circuit, district, or bankruptcy judge, or a magistrate, has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or alleging that such a judge or magistrate is unable to discharge all the duties of office by reason of mental or physical disability, may file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of the facts constituting such conduct. In the interests of the effective and expeditious administration of the business of the courts and on the basis of information available to the chief judge of the circuit, the chief judge may, by written order stating the reasons thereof, identify a complaint for the purposes of this subsection and thereby dispense with filing of a written complaint."

Section 137 of Title 28 provides:

"The business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court.

The chief judge of the district court shall be responsible for the observance of such rules and orders, and shall divide the business and assign the cases so far as such rules and orders do not otherwise prescribe.

If the district judges in any district are unable to agree upon the adoption of rules and orders for that purpose the judicial council of the circuit shall make the necessary orders."

Statement of the Case

A. The Origin and Present Statutory Structure of Judicial Governance

This Court has only once addressed the structure of judicial councils established by Congress in 1939, in *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74 (1970). Certain legislative changes have been enacted in the 27 years since then. As the Judicial Branch has grown in size and as its duties have become more complex, Congress has established structures and mechanisms for its effective administration. An increasingly focused concern of Congress over the past twenty years has been the need for judicial discipline — remedying the types of actions by and behaviors of Article III judges that undermine public and congressional confidence in the Judicial Branch. To understand the present statutory scheme, and to appreciate the adverse effect of the judgment below, petitioners will set forth a brief description of the origin and the structures Congress established for what may be termed judicial governance.

1. The 1939 Act

Prior to 1939, there were no structures for governance of or by the Judicial Branch. With the support of the Attorney

General and Article III judges, Congress enacted the Administrative Office Act of 1939.[1] Among other things, this act created circuit judicial councils and broadly authorized judicial councils to act in furtherance of the effective and expeditious administration of justice. It provided that "[t]o the end that the work of the district courts shall be effectively and expeditiously transacted, it shall be the duty of the senior circuit judge of each circuit to call at such time and place as he shall designate, but at least twice in each year, a council composed of the circuit judges for such circuit." *See* Administrative Office Act § 306, 53 Stat. 1223 (1939). The statute also mandated that "[i]t shall be the duty of the district judges promptly to carry out the directions of the council as to the administration of the business of their respective courts." *Id.*[2]

The authority granted to circuit judicial councils under this statute is broad and includes the ability to address and to remedy any judicial conduct deemed prejudicial to the administration of justice. One of the primary drafters of this provision, Hon. D. Lawrence Groner, Chief Justice of the Court of Appeals for the District of Columbia Circuit, explained a fundamental purpose of the bill as follows:

---

[1]A committee of federal judges selected by Chief Justice Charles Evans Hughes and a committee of attorneys from the Department of Justice drafted the statute. S. Rep. No. 426, 76th Cong., 1st Sess., at 1 (1939).

[2]The act contained no mechanism for enforcement of an order of a judicial council. When this omission was noted by Representatives Cellar and Chandler at the hearing on the bill, Hon. D. Lawrence Groner, Chief Justice of the Court of Appeals for the District of Columbia, commented, in language and perspective that may sound quaint today, that he could not conceive that any judge, "when he is admonished by this council of judges that he must do in accordance with the report made to him a particular thing to correct what is regarded as an abuse, that he will fail to do it." *Hearings on H.R. 2973, H.R. 5999 before the Committee on the Judiciary of the House of Representatives*, 76th Cong., 1st Sess., at 14 (March 2 & April 15, 1939).

> "[T]here was a recognition of the fact that, in the interest of maintaining the general and universal confidence of the people in the courts, it was incumbent upon the courts themselves, the judges of the courts, to clean their own house, rather than be subject to the embarrassment and destruction of our theory of government by having it done by someone else." *Hearing on S. 1188 before a Subcommittee of the Senate Committee on the Judiciary*, 76th Cong., 1st Sess., at 9 (April 4 & 5, 1939).

2. The 1948 Recodification

The 1948 general recodification altered the wording but not the scope of this statute. Codified as 28 U.S.C. § 332, the statute provided that "[e]ach judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit." The reviser's note explained this amendment as merely a change in "phraseology," which did not alter the authority of circuit councils. H.R. Rep. No. 308, 80th Cong., 1st Sess., at A46 (1947).

In 1970, this Court reviewed aspects of this legislation in *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74 (1970). In declining to issue a writ of mandamus, the opinion for the Court did not make any ruling on Section 332(d)(1)).

3. The 1980 Act

In 1980, Congress enacted the Judicial Councils Reform and Judicial Conduct and Disability Act, Pub. L. No. 96-458,, 94 Stat. 2035 (1980). Among other things, Congress evinced concern for the need for greater accountability of Article III judges and mechanisms for the removal of Article III judges other than through impeachment; Congress expressed dissatisfaction with what it perceived as the inconsistent and timid use

by judicial councils of the authority previously granted to them in 1939 under Section 332(d); and Congress repeatedly voiced the need for judicial discipline. *See* H.R. Rep. No. 96-1313, 96th Cong., 2d Sess., at 1-7 (1980). Notwithstanding the expression in Congress of such concerns and dissatisfactions, no fundamental change to the 1939 structure was made. As eventually passed, the 1980 Act only altered the composition of judicial councils to include district and circuit judges and made minor changes in Section 332 (d)(1).

Congress did enact a new statute, the Judicial Conduct and Disability Act, codified at 28 U.S.C. § 372(c). Prior to 1980, the machinery for judicial governance of the Judicial Branch (namely, Section 332(d)(1) discussed above, and Section 372(b) (certification of a judge as mentally or physically unfit)) would be set in motion only by actions of, in effect, the judicial councils. Congress was concerned with greater accountability of the Judicial Branch to the public. The new statute created a mechanism that permitted "any person" to file a complaint against any judicial officer (Article III judge, bankruptcy judge, or magistrate), and it established a process in which judicial councils would analyze, investigate, and act upon such complaints. Section 372(c) permits "[a]ny person" to file a complaint with a judicial council that any judicial officer engaged in conduct prejudicial to the administration of justice or is mentally or physically unfit; it sets forth procedures by which complaints are reviewed, investigated, disposed of or remedied, with notice to the complainant; it provides for a right of review to the Judicial Conference and precludes court review; and it provides for confidentiality of such proceedings.

4. The 1990 Act

A decade later Congress again addressed Section 332(d) in the Judicial Improvements Act, Pub. L. No. 101-650, 104 Stat.

5089 (1990). Congress had increased its focus on what it said was the need for discipline of federal judges. In the period since the 1980 Act, three Article III judges had been impeached by Congress. Congress' oversight of the issue of judicial discipline focused on the need for improvement, especially in view of the actual and projected growth of the Judicial Branch. *See* H.R. Rep. No. 101-512, 101st Cong., 2d Sess., at 7-15 (1990). In the end, the only amendment to Section 332(d) was to add the authority of the judicial councils to seek contempt against any judicial officer or court employee who does not obey an order of the judicial council. *Compare* p. 5 n.2, *supra*.

B. The Transferred Cases

The present dispute originated in incidents that occurred in connection with two cases before respondent McBryde: *Torres v. Trinity Industries, Inc.*, CA 4:90-812-A (N.D. Tex.) and *United States v. Satz*, No. 4:94-CR-094-R (N.D. Tex.). The first involved respondent McBryde's threatened contempt citation against the Clerk of the District Court. The second involved respondent McBryde's contempt citations against an Assistant United States Attorney from another district and a United States Postal Inspector. The underlying facts are not relevant to the legal issues presented here. The decision below acknowledges that petitioners and respondent characterized the factual context of these cases from different but reasonable perspectives. The court wrote, however, that neither characterization played a determinative role in the court's legal analysis (22a-23a).

But respondent's undisputed acts did threaten to disrupt the administration of justice. In *Torres*, respondent entered an order threatening to hold the Clerk of the District Court, Nancy Doherty, in contempt as a result of a subordinate's placement of settlement proceeds into the wrong kind of registry account. This act, in addition to threatening the career and reputation of

an officer of the court, invaded the supervisory function of the district court judges *en banc* over the clerk of the court, *see* 28 U.S.C. § 753; *Ex Parte Hennen*, 13 Pet. (38 U.S.) 230 (1839); and was contrary to the procedures formulated by the Administrative Office of the United States Courts for handling the registry of funds.

In *Satz*, respondent McBryde did not credit the written communication from a fellow district judge in Arizona concerning a sealing order which applied to an ongoing grand jury investigation, and respondent McBryde declined even to call that judge. He proceeded to hold an Assistant United States Attorney in contempt. This act threatened the prospect that the Arizona district court judge would be called to testify about sealing orders relating to an ongoing grand jury investigation in another district, putting that proceeding at risk and presenting the needless spectacle of a proceeding involving the credibility of the Arizona district court judge in issuing the sealing order.

1. Petitioner Buchmeyer's Orders

Petitioner Buchmeyer learned of respondent McBryde's actions on the 25th and 26th almost simultaneously.[3] As Chief Judge of the District, he then consulted virtually every other judge (active and senior) of the Northern District of Texas.[4] None objected to the proposed transfer of these two cases. On

---

[3]Petitioner Buchmeyer learned of the order in *Torres* when Ms. Doherty, on being handed a copy of the order, became visibly shaken during a meeting of judges discussing security after the Oklahoma City bombing; he learned of the contempt rulings in *Satz* when the U.S. Attorney's office approached him to establish a procedure for the release of the AUSA and the Postal Inspector should they be ordered incarcerated by respondent McBryde.

[4]Petitioner Buchmeyer consulted with all but two Senior District Judges, each of whom had a serious health condition.

April 27, 1995, petitioner Buchmeyer entered an order vacating respondent McBryde's April 25 order in the *Torres* case and reassigning this case to himself. On May 1, 1995, petitioner Buchmeyer issued a second order vacating respondent McBryde's contempt order in *Satz* and reassigning this case to himself. After issuing the order, petitioner Buchmeyer twice offered to convene a meeting of the district court *en banc* for respondent McBryde to discuss his objections and have the matter discussed. Respondent refused.

The orders, which relied upon 28 U.S.C. § 137 as authority to reassign the cases, were explained in a subsequent memorandum setting forth, *inter alia*, that respondent's order in *Torres* invaded the authority of the district court *en banc*, and that respondent's order in *Satz* threatened the administration of justice in the entire district.

2. Respondent McBryde's Request to the Judicial Council for Assistance

On July 21, 1995, respondent McBryde filed a Request for Assistance in Resolution of Dispute (the "Request") with the Judicial Council. He invoked the Judicial Council's authority under 28 U.S.C. § 332(d)(1), claiming that the actions of petitioner Buchmeyer in reassigning the two cases "have interfered with the 'effective and expeditious administration of justice within [this] circuit.'" Respondent McBryde requested that the Judicial Council rule that petitioner Buchmeyer had acted improperly and without legal authority in reassigning the two cases and that the cases should be returned to his docket.

3. The Judicial Council Order

A special committee of the Judicial Counsel convened, took testimony of witnesses, and reported to the Judicial Council. On October 20, 1995, seventeen members of the Judicial

Council denied respondent McBryde's Request. The Council unanimously concluded that respondent McBryde's conduct in both cases was "unwarranted" and detrimental to the effective and efficient administration of justice in the circuit.[5]

The Judicial Council determined that it was unnecessary to decide whether 28 U.S.C. § 137 authorized petitioner Buchmeyer's actions because the Judicial Council concluded pursuant to 28 U.S.C. § 332(d)(1) that respondent McBryde's conduct was an impediment to the effective administration of justice. The Judicial Council reassigned the two cases to petitioner Buchmeyer.

---

[5]With respect to *Satz*, the order determined that:

> "Judge McBryde's attack on AUSA Darcy A. Cerow and Postal Inspector Rex Whiteaker and his accusations against them of lying and contempt of court were baseless, threatening irreparable damage to the professional reputations and careers of both Ms. Cerow and Mr. Whiteaker. The record and our investigation confirm that the statements and conduct of AUSA Darcy Cerow and Postal Inspector Rex Whiteaker were truthful, professional, and appropriate under the circumstances. In addition, Judge McBryde's refusal to accord proper respect to the orders of another United States District Judge which sealed sensitive Rule 11 proceedings undermined a grand jury investigation" (56a).

As to *Torres*, the Judicial Council determined that:

> "Judge McBryde's conduct against Nancy Doherty . . . was unwarranted, abusive and threatened to damage Ms. Doherty's professional reputation. We are persuaded that Ms. Doherty took appropriate action upon being advised of the problems regarding the deposit of funds held for the minor and conducted the affairs of her office in a professional manner" (56a).

C. The Decision of the Fifth Circuit

Following entry of the Judicial Council's order, respondent McBryde filed a petition for a writ of mandamus with the Court of Appeals for the Fifth Circuit seeking reversal of petitioner Judicial Council's order and return of the two cases. Respondent contended that a judicial council could not reassign cases or discipline a judge under Section 332(d). Petitioner Judicial Council opposed the petition, asserting, *inter alia*, that respondent McBryde lacked Article III standing and that the judicial council order under Section 332(d) was proper.

Altering the sequence with which opinion of the Court of Appeals addressed these issues, the Court of Appeals held that (1) the Judicial Council could not issue an order under Section 332(d) that, in the view of that court, "censured" a judge for "misconduct" because of the existence of Section 372(c); (2) it had no jurisdiction to issue a writ of mandamus against petitioner Judicial Council; but (3) the orders of petitioner Judicial Council were not binding unless enforced in the district court, and the Court of Appeals did have jurisdiction to issue mandamus to the petitioner Buchmeyer; (4) petitioner Buchmeyer's order transferring the cases from respondent McBryde was not authorized by 28 U.S.C. § 137; and (5) a "case or controversy" under Article III existed because respondent McBryde had incurred damage to his "reputation" which was sufficient injury in fact to give respondent constitutional standing to prosecute litigation concerning the order of petitioner Judicial Council transferring two cases from his docket entered pursuant to Section 332(d).

REASONS FOR GRANTING THE WRIT

Among the significant challenges facing the Judicial Branch is that of efficient administration. The exponential growth of

the personnel (Article III judges, bankruptcy and magistrate judges with Article I status, and related court officers), the facilities, and the budgets of the Judicial Branch have heightened that challenge. With the urging of the Judicial Branch, Congress has to date allowed the administration, including judicial discipline, to be performed by the Judicial Branch. That administration is conducted by the respective judicial councils of each circuit, and by the Judicial Conference. But just as Congress has enacted laws in the last 20 years directing the greater openness, ethical behavior, and public accountability of persons in the Executive and Legislative Branches, it has also done so for those in the Judicial Branch. One of those laws, 28 U.S.C. § 372(c), provides for greater accountability of the Judicial Branch by permitting "any person" to complain about any judicial officer, and creating procedures and remedies for such complaints.

The decision below substantially defeases the ability of the Judicial Branch, through the judicial councils and district court chief judges, efficiently and expeditiously to rectify problems in the administration of justice that arise from the conduct of federal judges. The decision construes the broad statutory authority of judicial councils under Section 332(d)(1) to "make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit," to contain an implied exception that judicial councils may not issue orders under Section 332(d)(1) when a federal judge engages in *misconduct*. The decision below reached this result only by ignoring numerous analytical decisions of this Court, *and* a substantive decision of this Court, *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985). The decision below does so by also ruling that a federal judge, whose "reputation" is affected by an order of the judicial council, has standing under Article III to invoke the jurisdiction of a federal court, contrary

to the decision of this Court in *Paul v. Davis*, 424 U.S. 693 (1976). But the deleterious impact of the decision below on the efficient administration of justice and governance of the Judicial Branch transcends the impropriety of both, and either, of these rulings.

I. There Is No Implied Limitation on the Authority of the Judicial Branch to Address Judicial "Misconduct" Under Section 332(d)(1) or Section 137, and the Decision Below Conflicts with Prior Decisions of this Court, with the Plain Meaning of the Statute, and with the Administrative Needs of the Judicial Branch

Section 332(d)(1) provides that each circuit judicial council "shall make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit." By its terms, this section confers sweeping discretionary authority upon the judicial councils with no limitation other than "the effective and expeditious administration of justice." The statutory breadth is consistent with that sought by the committee appointed by Chief Justice Hughes (*see* pp. 5-6, *supra*), and was so read by then Judge Warren E. Burger and then Chief Judge J. Edward Lumbard in published articles.[6] This is also the conclusion of the Judicial Conference of the United States in a report presented to Congress that the authority vested in the judicial councils by Section 332:

> "extend[s] not merely to dealing with the questions of the handling and dispatching of a trial court's business

---

[6] *Proceedings of the Attorney General's Conference on Court Congestion and Delay in Litigation* 59-60 (1958); Lumbard, *The Place of the Federal Judicial Councils in the Administration of the Courts*, 47 A.B.A. J. 169 (1961).

> in its technical sense, but also to dealing with the business of the judiciary in its broader or institutional sense, *such as the preventing of any stigma, disrepute, or other element of loss of public confidence occurring as to the federal courts or to the administration of justice by them, from any nature of action by an individual judge or a person attached to the courts.*" *Report on the Powers and Responsibilities of the Judicial Councils*, H.R. Doc. No. 201, 87th Cong., 1st Sess., at 7 (1961).

In the face of this broad authority, the Court of Appeals held that, despite the absence of any language of limitation in the statute itself, Section 332(d)(1) did not authorize judicial councils to issue orders premised on a judge's "misconduct," because the enactment of Section 372(c) in 1980 constituted an implied limitation on Section 332(d) (46a-47a). The judgment below is contrary to numerous decisions of this Court concerning statutory interpretation, and to this Court's decision in *Richardson-Merrell Inc. v. Koller*, 472 U.S. 424 (1985). In addition, the decision below will impose an undue limitation on the efforts of circuit judicial councils to assure the effective administration of the courts.

The Court of Appeals did not even purport to analyze the statute in accordance with the recent and repeated decisions of this Court. The Court of Appeals did not analyze the statutory language, in particular the "all orders" portion of Section 332(d)(1). Instead, the court relied upon a term ("misconduct") that does not appear in Section 332(d); moreover, that term does not even appear in Section 372(c), the source relied upon as the implied repealer of Section 332(d). The court did not analyze the statutory schemes of Sections 332(d) and 372(c) as a whole to ascertain whether there was a necessary inconsistency or conflict between the two. As this Court has repeatedly held,

"when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."[7] There is no "manifest inconsistency or positive repugnance," *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 565 (1963), or "irreconcilable conflict," *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 468 (1982); *Rodriguez v. United States*, 480 U.S. 522, 524 (1987), between Section 332(d) and Section 372(c) that justified this result, nor did the court purport to engage in such analysis. By drawing an untenable distinction between Sections 332(d) and 372(c), the Court of Appeals held, in effect, that Section 372(c) impliedly repealed the authority of judicial councils to act under Section 332(d) when a judge engages in "misconduct" or feels that judicial council's action is a "censure." Such a construction ignores repeated decisions of this Court that a cardinal principle of statutory construction is that "implied" repeals are disfavored.[8] In short, the court below did not even purport to adhere to the decisions of this Court.

To read Section 332(d)(1) as containing an implicit *proviso* (*e.g.*, "Except for contexts arising out of the misconduct of a federal judge or where such order is deemed a censure of a federal judge, each judicial council shall make all necessary and appropriate orders. . .") is not required by the statutory lan-

---

[7] *Morton v. Mancari*, 417 U.S. 535, 551 (1974); *Accord Vimar Seguros Y Reaseguros S.A. v. M/V Sky Reefer*, 515 U.S. 528, 532 (1995); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984); *Watt v. Alaska*, 451 U.S. 259, 267 (1981); *FAA v. Robertson*, 422 U.S. 255, 266 (1975).

[8] *E.g.*, *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 168 (1976); *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 262 (1992); *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 441 (1987); *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936).

guage, as the court below acknowledged.[9] To read into Section 332(d) such an implicit *proviso* is contrary to existing authority, as the court below acknowledged.[10] To read an implicit *proviso* into Section 332(d) is contrary to the legislative history of the 1939 Act[11] and the 1980 Act.[12] There is nothing inconsistent between permitting "any person" to file a complaint that a judge "has engaged in conduct prejudicial to the effective and

---

[9](*See* 46a.)

[10]The court below acknowledged the published decisions involving judicial council orders under Section 332(d) occasioned by "judicial misconduct," (44a-45a), as well as Justice Harlan's extensive concurring opinion in *Chandler*, 398 U.S. at 120-25.

[11]For example, Chief Justice Groner explained that the Councils would cope not only with delays but also with "any other matter which is the subject of criticism, or properly could be made the subject of criticism, for which [a district judge] may be responsible." Hearings on S. 188, *supra*, at 11. The Senate committee included this part of the testimony in its report recommending passage of the bill. S. Rep. No. 426, *supra*, at 3 (1939). Chief Justice Groner later stated that the Council's responsibilities would embrace correction of "whatever is wrong in the administration of justice, from whatever sources it may arise," as a means of promoting "the strengthening of confidence on the part of the people." Hearings on S. 188, *supra*, at 12-13, 14.

[12]Nothing in the legislative history indicates that Congress, in enacting the 1980 Act, intended to limit in any way the power of the Judicial Council to take action necessary to prevent stigma, disrepute or loss of public esteem or confidence in the court system resulting from the actions of a judge. When Congress enacted the 1980 Act, it at the same time recodified the language of Section 332 in a manner that was intended to expand, not limit, the statutory powers of the judicial councils. *See* H.R. Rep. No. 96-1313, *supra*, at 8 (1980) ("This language [] broadens that found in existing law . . . . "). The House Report also observed that "this section [recodifying Section 332] preserves the breadth and flexibility of the original legislation. Yet, it — especially when read with section 3 of the proposed legislation [adding the judicial complaint mechanism to Section 372] — clarifies that the judicial councils possess broad authority to preserve the integrity of the circuit . . . ." *Id.* at 9 (footnote omitted).

expeditious administration of the business of the courts" and permitting judicial councils on their own to issue "all . . . orders for the effective and expeditious administration of justice" necessitated by the behavior of a judge, whether characterized as "misconduct" or whether the judicial council's order is characterized as a "censure." The needs of the judicial system may require prompt corrective actions. Moreover, to read any implied limitation into Section 332(d) from the enactment of Section 372(c) would also be contrary to the need for greater "judicial discipline" and greater "judicial accountability" that have been the consistent, loud themes heard in Congress, starting with hearings in 1977 that led to the 1980 Act, and continuing in the oversight hearing and reports that led to the 1990 Act.

In *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 435 (1985) — decided five years after the adoption of Section 372(c) — this Court indicated that the plain words of Section 332(d) would permit a judicial council to enter an order based upon what the court below would label "misconduct." This Court wrote that "an attorney whose reputation has been egregiously injured by the trial court's disqualification decision might be able to obtain relief from the Circuit Judicial Council pursuant to 28 U.S.C. § 332(d)(1)." The Court specifically relied upon two decisions in which judicial councils issued orders under Section 332 based upon "misconduct" by a federal judge because, this Court wrote, judicial councils "exist 'to provide an administrative remedy for misconduct of a judge for which no judicial remedy is available.'" *Id.* at 435 and n.2. The Court understood and wrote that the judicial councils were empowered under Section 332(d)(1) to take appropriate steps to

address judicial "misconduct" notwithstanding the enactment of Section 372(c).[13]

The Court of Appeal's reasoning is similarly flawed with respect to the authority of a chief judge of a district court under Section 137. The plain language of this provision states that a chief district judge "shall divide the business and assign the cases" unless a specific local rule and order is applicable. 28 U.S.C. § 137; *see also Martinez v. Winner*, 771 F.2d 424, 434 (10th Cir.) (chief judge assigns cases "when the rules and orders make no provision"), *modified on other grounds*, 778 F.2d 553 (10th Cir. 1985), *vacated on other grounds*, 475 U.S. 1138 (1986).[14] While the Court of Appeals acknowledged that this provision granted a chief judge some authority to reassign cases, the court discerned an implied limitation that such reassignments must be "purely administrative," involving situations such as the recusal, death, disability or new appointment of a judge (40a). There is no basis, however, in either the statutory language or legislative history for this implied limitation on the authority of a chief district judge under Section 137. Instead, petitioner Buchmeyer properly interpreted Section 137, as part of the self-regulatory scheme for the Judicial Branch created by Congress, to empower a chief district judge to take broader actions to assure the effective administration of justice in the

---

[13]In reviewing *Koller*, the Court of Appeals conceded that it provides "some support" for the Judicial Council's interpretation of Section 332 (46a).

[14]Petitioner Buchmeyer and all the active district judges in the Northern District except Judge McBryde concluded that no local rule was applicable in this matter. The Court of Appeals indicated that Special Order No. 3-130 in the Northern District of Texas which governs the initial assignment of cases also "by implication" covers the reassignment of cases. The court's reasoning is contrary to the clear language of the local rule and fails to afford any deference to the interpretation of the rule adopted by the very entity which promulgated it.

district. In *Chandler*, seven Members of this Court did *not* ascribe to the view that the Judicial Branch was powerless to rectify the acts or conduct of a single judge that threattened the day to day operation of the judicial system. 398 U.S. at 85 ("But if one judge in any system refuses to abide by such reasonable procedures [concerning case allocation] it cannot hardly be that the extraordinary machinery of impeachment is the only recourse"); *id.* at 122-24 (Harlan, J., concurring) (rejecting Judge Chandler's contention that Section 332 did not authorize the Council to punish him for "misbehavior"). Respondent's acts presented such threats, *see* pp. 8-9, *supra*, and Section 137 authorized the remedial actions taken.

The serious adverse consequences of the judgment of the Court of Appeals cannot be underestimated. Obviously, the judgment defeases petitioner Judicial Council from issuing an order under Section 332(d) to any of the 211 "judicial officers" within the Fifth Circuit that may be based upon "misconduct" or be characterized as a "censure." But in a practical sense, the decision below conflicts with the operation of other judicial councils.[15] The authority of Section 332(d) is actively used to enter orders that are necessitated by "misconduct" of judicial

---

[15]A number of judicial councils have expressly recognized the ongoing role of Section 332 in addressing judicial misconduct: "[C]hief judges, as chairmen of the circuit judicial councils, can, just as they always have, consider information from any source, anonymous or otherwise. This solution is consistent with congressional expression of intent that informal methods of resolving problems, traditionally used under section 332, should continue to be used in many cases." D.C. Circuit Rules Governing Complaints of Judicial Misconduct or Disability, Rule 2, Commentary; Third Circuit Rules Governing Complaints of Judicial Miscomduct or Disability, Rule 2, Commentary (same); Sixth Circuit Rules Governing Complaints of Judicial Misconduct or Disability, Rule 2, Commentary (same); Ninth Circuit Rules Governing Complaints of Judicial Misconduct or Disability, Rule 2, Commentary (same).

officers. It is unfortunate to acknowledge that with the ever-increasing size and responsibilities of the Judicial Branch, the frequency of "misconduct" will increase.[16] One recent study, based upon extensive interviews and surveys of chief circuit judges, concluded that methods other than Section 372(c) for addressing judicial misconduct are "thriving," including the invocation of Section 332(d). Geyh, *Informal Methods of Judicial Discipline*, 142 U. Pa. L. Rev. 243, 245 (1993). All such mechanisms of judicial governance are critical to the effective administration of the Judicial Branch: some judicial "misconduct" may not generate a complaint as required by Section 372(c), *see id.* at 256 (quoting a chief circuit judge: "In my experience here, the most serious allegations of misconduct never hit the complaint process"), or the adverse effects on the overall efficient administration of justice require prompt action.

Efficient and effective judicial discipline is important to the structure of independence underlying Article III. Judicial councils and chief judges have come to rely on a variety of mechanisms, formal and informal, including Section 332, for addressing judicial "misconduct." Regardless of the number of times Section 332 has been invoked in formal orders of judicial councils to address what the court below termed "misconduct," one observer has stressed that "the very existence of the statute may give chief judges additional leverage needed to remedy misbehavior informally." Geyh, *supra*, at 271. By artificially

---

[16]Numerous statistical data show this growth. For example, since 1960. the number of civil lawsuits filed annually in district courts has increased over four fold (from under 60,000 to about 240,000), while the number of district court judges has almost tripled (from 233 to about 650). *See* Administrative Office of the United States Courts, *Statistical Tables for the Federal Judiciary* 27 (1995); Administrative Office of United States Courts, *Judicial Business of United States Courts* 7 (1994); *Annual Report of the Director of the Administrative Office of the United States Courts — 1960* 205, 224 (1961).

interpreting Section 332(d) and Section 137 to preclude the Judicial Branch from acting when "effective and expeditious administration of justice" is threatened by what may be labeled "misconduct," the Court of Appeals has not only defeased the Judiciary of its oldest and broadest statutory basis for judicial governance, it has unwittingly insulated from redress "misconduct" that does not generate a formal Section 372(c) complaint.

II. Assumed Injury to a Federal Judge's "Reputation" Does Not Constitute Article III Standing to Challenge a Judicial Council Order in Federal Court

The order of petitioner Judicial Council directed that the *Torres* and *Satz* cases be assigned to petitioner Buchmeyer's docket. None of the *parties* to those *cases* — the plaintiffs or defendant in *Torres*, or the United States or Mr. Satz in *Satz* — objected to or disputed that order. Only respondent McBryde, a federal judge, objected. He did so notwithstanding the plain command of Section 332(d)(2) that "[a]ll judicial officers and employees of the circuit shall promptly carry into effect all orders of the judicial council." The court below sanctioned the creation of collateral litigation by "judicial officers" against a judicial council over its orders by holding that an Article III judge was injured in fact, so that a "case" or "controversy" within Article III existed, when his reputation was harmed by an order of the Judicial Branch.

Under Article III, § 2 of the Constitution, federal courts only have jurisdiction of a "case" or "controversy." *Raines v. Byrd*, 117 S. Ct. 2312, 2317 (1997). One element of this "bedrock requirement" of Article III is standing, and the "irreducible constitutional minimum of standing" embodies personal injury in fact. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Allen v. Wright*, 468 U.S. 737, 751 (1984).

No litigant in the two reassigned cases challenged the order issued under Section 332(d)(1).[17] Rather, the court below held that respondent McBryde, a judicial officer, suffered personal injury in fact sufficient to constitute an Article III case or controversy to support a petition for a writ of mandamus to vacate the order. The court did not hold that, as a federal judge, respondent had a constitutional right to the assignment of those two cases, (*see* 35a), a result compelled, petitioners submit, by precedent and long practice.[18] Rather, the Court of Appeals found personal injury in fact on a ground in direct conflict with this Court's decision in *Paul v. Davis*, 424 U.S. 693 (1976).[19]

---

[17]Petitioner Judicial Council has never asserted that orders of a judicial council may not be the subject of or in effect reviewed by Article III courts. Rather, its position has been that litigants in cases who have a sufficient liberty or property interest are the appropriate parties with constitutional standing to challenge them. *Compare, e.g., White Motor Corp. v. Citibank, N.A.*, 704 F.2d 254 (6th Cir. 1983) (reviewing bankruptcy rules promulgated by judicial council in appeal from district court application of rules); *Hilbert v. Dooling*, 476 F.2d 355 (2d Cir. 1973) (issuing mandamus to require district judge to implement judicial council rule that would require dismissal of ongoing criminal proceeding); *Utah-Idaho Sugar Co. v. Ritter*, 461 F.2d 1100 (10th Cir. 1972) (reviewing judicial council assignment order in the course of considering mandamus challenge to district court's refusal to reassign cases); *Jimenez v. Aristeguieta*, 311 F.2d 547 (5th Cir. 1962) (deciding appeal from district court decision rejecting a habeas challenge to a judicial council order reassigning cases to a new district judge).

[18]That conclusion is undeniably correct. The authority of appellate courts to reassign cases upon remand pursuant to 28 U.S.C. § 2106 provides a longstanding demonstration that federal judges have no constitutionally protected interest in retaining their assignment to any particular case. *See Liteky v. United States*, 510 U.S. 540, 554 (1994) (recognizing federal appellate courts' inherent authority to reassign cases pursuant to § 2106). *See also Board of Regents v. Roth*, 408 U.S. 564, 577-78 (1972).

[19]The court prefaced this discussion with an "observation," citing *Lujan*, that a federal judge's interest in deciding two cases "is one that Congress *might* constitutionally recognize and protect without running afoul

Although writing that respondent did not have a constitutionally protected interest in his ability to decide the two reassigned cases, the Court of Appeals held that respondent was constitutionally injured in fact by the "damage done to [respondent's] reputation" by virtue of the reassignment (35a). But as this Court's decision in *Paul v. Davis* makes clear, alleged damage to reputation, without the concomitant deprivation of some other protected interest, does not constitute injury in fact for constitutional standing purposes. 424 U.S. at 711-12; *see Lujan*, 504 U.S. at 560 (injury in fact is an invasion of a legally protected interest); *Warth v. Seldin*, 422 U.S. 490, 508 (1975).[20] Indeed, respondent McBryde agreed in the court below that under *Paul*, injury to reputation was not constitutionally sufficient to constitute standing under Article III.[21] By permitting the proceeding below, the court has sanctioned a new form

---

of the limits of Article III" (35a; emphasis added). But Congress has not purported to confer statutory standing on a federal judge to litigate such reassignments, *compare* 28 U.S.C. § 2106; 28 U.S.C. § 332(d)(2), and no personal injury in fact for constitutional standing purposes exists.

[20]In addition, the Court of Appeals held that the "redressability" element of the Article III "case" or "controversy" requirement was satisfied because the damage to respondent's reputation "*probably* would be redressed *in part* by a finding" that petitioners did not have the power to reassign the two cases (35a; emphasis added). This holding is in direct conflict with this Court's numerous holdings that the redressability prong of Article III's standing requirement is satisfied only when it is "'*likely*,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 561 (emphasis added) (quoting *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976)); *see also Allen*, 468 U.S. at 751; *Flast v. Cohen*, 392 U.S. 83, 97 (1968).

[21]Respondent McBryde's brief conceded: "While defamation alone does not invade a liberty interest, injury to reputation combined with the simultaneous alteration of legal status such as loss of employment or denigration of other protected property rights does impinge on constitutionally protected liberty interests," *citing Paul v. Davis*. Brief at 35.

of litigation within the Judicial Branch. This entire construct is contrary to — or perhaps in defiance of — this Court's decision in *Paul*.[22]

Petitioners recognize that this Court may not deem an error of constitutional law, or an error concerning statutory construction, sufficient to grant *certiorari*. But petitioners respectfully urge that the existence of such errors, when combined with the adverse effects on the governance of the Judicial Branch, do warrant review by this Court. In the face of a statute providing that all judges shall obey judicial council orders (28 U.S.C. § 332(d)(2)), the court below held that federal judges had standing under Article III (injury in fact) to commence as action in federal court (mandamus) to seek to disobey an order of a judicial council. But litigation by a federal judge, in his or her official capacity, against a judicial council, in its official

---

[22]Not only did respondent lack Article III standing to commence litigation against petitioner Judicial Council, the Court of Appeals itself had no jurisdiction to entertain the petition for writ of mandamus. Courts of appeals, as inferior courts under Article III, only have such jurisdiction as Congress has bestowed by statute. No statute grants such jurisdiction over petitioner Judicial Council, a proposition the court below apparently acknowledged. Nevertheless, the Court of Appeals found jurisdiction under 28 U.S.C. § 1651(a) to issue a writ of mandamus to petitioner Buchmeyer to ignore the order of the petitioner Judicial Council, based on an imaginary construct. The Court of Appeals found jurisdiction based on the reasoning that a judicial council order must be enforced, and *if* petitioner Buchmeyer or another judicial officer had flouted the Council's reassignment order and *if* the petitioner Judicial Council then had brought a contempt action under Section 332(d)(2) to have its order enforced, then the Court of Appeals would have had appellate jurisdiction of a final order of contempt, and thus a writ of mandamus could then issue "in aid of" that appellate jurisdiction (31a-35a, 36a). But in the effort to justify its jurisdiction, the court was required to rule — indeed, its jurisdiction was entirely premised upon the legal conclusion — that orders of a judicial council are of no significance unless and until enforced in a federal court (31a-32a).

capacity, to vindicate "reputation" does not constitute a "case" or "controversy" within the scope of Article III, and substantially undermines the ability to administer, efficiently and expeditiously, the Judicial Branch.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that the Court grant the Petition.

Dated: New York, New York
February 26, 1998

Respectfully Submitted,

THOMAS B. ALLEMAN
WINSTEAD SECHREST & MINICK P.C.
5400 Renaissance Tower
1201 Elm Street
Dallas, Texas 75270
(214) 745-5103

Counsel for Petitioner Jerry Buchmeyer, Chief Judge of the United States District Court for the Northern District of Texas

ROBERT B. FISKE, JR.
Counsel of Record
LOWELL GORDON HARRISS
DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, N.Y. 10017
(212) 450-4000

Counsel for Petitioner The Judicial Council of the Fifth Judicial Circuit

APPENDICES

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-11082
Decided: July 2, 1997

In re John H. McBRYDE, U.S. District Judge, Petitioner.

On Petition for Writ of Mandamus to the United States District Court for the Northern District of Texas

---

Before:

PATRICK E. HIGGINBOTHAM, Circuit Judge, HIGGINBOTHAM, EMILIO M. GARZA and DENNIS, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

This petition arises out of the reassignment of two cases once pending before Judge McBryde in the Northern District of Texas. The two cases were styled *United States v. Michael Eric Satz* and *Sanjuana Torres, et al. v. Trinity Industries, Inc.* Judge McBryde requested the Judicial Council of the Circuit to invalidate these two reassignments. The Council found that

"Judge Buchmeyer's factual predicate, on which he based his orders, was correct" and ultimately ordered their reassignment by its own order. Judge McBryde then filed a petition for mandamus with this court. The petition raises difficult questions of jurisdiction and carries us into uncharted waters of superintendence of Article III judges. We begin with a description of the two cases. We then return to the procedural history of the petition for mandamus and the action taken by the Council. Finally, we examine our jurisdiction and then the merits of Judge McBryde's petition.

I

A

Michael Satz was part of an organization that fraudulently offered loan referral services to individuals with poor credit ratings. The scheme made money by charging the individuals a referral fee in advance, with "boilerrooms" operating in several states.[1]

Grand juries in both Phoenix, Arizona, and Fort Worth, Texas, indicted Satz. The Phoenix case was assigned to Judge Paul G. Rosenblatt, and the Fort Worth case by random assignment to Judge McBryde. The Phoenix case reached trial first in late 1994. Satz was convicted and taken into custody, and Judge Rosenblatt eventually scheduled sentencing for May 15, 1995. Shortly thereafter, a Northern District of Texas jury

---

[1]The facts behind Satz's criminal enterprise are examined in more detail in *United States v. Gray*, 105 F.3d 956, 961-62 (5th Cir.), *cert. denied*, --- U.S. ----, 117 S.Ct. 1326, 137 L.Ed.2d 487 (1997); --- U.S. ----, 117 S.Ct. 1856, 137 L.Ed.2d 1057 (1997).

also convicted Satz, and Judge McBryde scheduled sentencing for April 28, 1995.

Investigations into the boilerrooms continued. In early 1995, Phoenix Assistant United States Attorney Darcy Cerow convened a grand jury, which began further investigations into Satz and three of his alleged co-conspirators: Lester Schwartz, Anthony Peter Schwartz, and Robert Schwartz. After extended negotiations, on March 27, 1995, the Schwartzes pled guilty before Judge Rosenblatt to certain crimes arising out of their boilerroom activities. In their plea bargains, the Schwartzes agreed to cooperate with law enforcement authorities in the continuing investigation of the boilerrooms. At the plea proceeding, the following colloquy occurred:

The Court: Anything further for the record?

Ms. Cerow: Your Honor, two things. One, I believe we need a number for the information.

The Clerk: CR 95-79.

The Court: Oh, yes.

The Clerk: They need to move to seal.

The Court: The motion to seal is granted. The criminal minutes of the docket entries corresponding to each of the Schwartz cases, which apparently have been available to the public throughout the pendency of this affair, reflected the fact that the Schwartzes had pled guilty and stated, "govt's oral m/ seal granted."

AUSA Cerow then contacted Northern District of Texas AUSA Phillip Umphres regarding the *Satz* case. According to testimony she later gave before Judge McBryde, Cerow told

Umphres of Judge Rosenblatt's sealing order and of the ongoing investigation. In particular, Cerow related that the Phoenix investigation had produced documents suggesting that Satz's involvement in certain boilerrooms was more extensive than enforcement authorities in either Arizona or Texas had previously believed. If verified, the information would lead to a longer sentence for Satz. The testimony of AUSAs Cerow and Umphres conflicted regarding the extent to which Cerow informed Umphres of the government's position regarding the scope of Judge Rosenblatt's sealing order.

On April 4, 1995, AUSA Umphres moved to continue Satz's Texas sentencing until June 23. This motion was not under seal. The motion asked Judge McBryde to continue the sentencing then scheduled for April 28 for three reasons. The first was a problem of logistics. Satz was currently held in Arizona and had a sentencing scheduled there in May. The second was that AUSA Cerow was continuing the Arizona investigation into Satz's boilerroom activities and his association with certain co-conspirators, which the motion identified as the Schwartz family. The motion recited that the information thus far generated suggested that Satz may have been a bigger player in the boilerrooms than had previously been believed and that he may have committed perjury at his Texas trial. The motion further stated that AUSA Cerow planned to continue the investigation by asking an Arizona grand jury to subpoena bank records and live witnesses, perhaps leading to the prosecution of other unnamed individuals. The third reason to continue Satz's sentencing was that the Arizona and Texas pre-sentence reports calculated Satz's offense levels in part using some of the same conduct. A good faith argument existed that this double-use constituted double jeopardy. The Fifth Circuit had already held that this double-use did not violate double jeopardy

principles. The Ninth Circuit had not yet decided the question. Thus scheduling the Texas sentencing after the Arizona sentencing would finesse any double jeopardy contention Satz might later make. The motion did not mention Judge Rosenblatt's sealing order as a reason to continue sentencing.

Meanwhile, Satz had difficulty getting to Fort Worth for his scheduled sentencing. He filed a motion to be transferred to Fort Worth with the Arizona district court, which Judge Rosenblatt denied on April 17. At the eventual hearings in his court, Judge McBryde stated that upon receiving notice of this order, he called Judge Rosenblatt and got him to agree to transfer Satz to Fort Worth.

On April 18, Judge McBryde denied AUSA Umphres' motion to continue Satz's Texas sentencing. The denial order stated, "[t]he contents of the motion of the United States of America indicates that the government has additional information concerning the activities of defendant MICHAEL ERIC SATZ ('Satz') that could have relevance to the sentencing of Satz." Judge McBryde ordered the United States to deliver a supplementary written report to the Probation Office detailing all such relevant information and requested the Probation Office to write an addendum to the PSR.

On April 21, AUSA Umphres filed under seal a renewed motion to continue sentencing along with five exhibits. Again, the text of the motion itself did not mention a sealing order. Instead it stated that Umphres had delivered some material to the Probation Office, but that this material was cumulative to documents that office already possessed. Further documents remained in Arizona, but AUSA Umphres did not know of their exact contents. These documents suggested Satz's involvement in additional boilerrooms, but the information was as yet

uncorroborated, and the Arizona investigation was continuing. According to the motion, "disclosure of the information set out in Exhibit A at this time [would] jeopardize [the] on-going grand jury investigation [in Arizona]." The motion to continue sentencing also asked Judge McBryde to order the Probation Office to keep all information secret from defendant Satz.

A memorandum from Umphres to the Probation Office was attached. It stated that AUSA Cerow had reached plea agreements with certain individuals above Satz in the boilerroom operation, and that these individuals had since been "debriefed." The memorandum explained that Cerow had informed Umphres "that the plea agreements and factual resumes relating to the defendant have been filed under seal as [Cerow] wanted to keep the fact of their cooperation secret [from Satz] for the moment in order to avoid alerting other targets of her investigation, who[m] she did not identify." Finally, the memorandum stated that Postal Inspector Rex Whiteaker once possessed certain information, but that Cerow had asked Whiteaker to send all documents in his possession to Arizona and had told him that all information was covered by the grand jury secrecy rules embodied in Fed.R.Crim.P. 6(e).

Umphres also attached as an exhibit a letter dated April 20 from Cerow to Umphres that again emphasized the continuing grand jury investigation and the Rule 6(e) concerns about disclosing information. This letter, which did not mention a sealing order, included the following paragraph:

> If, through an order of the court, we were to invade the secrecy of the grand jury investigation at this time, the investigation would be severely compromised. Although the targets are probably aware of the investigation, they do not know the extent of the grand jury's knowledge of their

activities. If the investigation were to become a matter of public record, the targets would be in a position to destroy documents, move assets to avoid forfeiture, and flee the country to avoid prosecution. These acts would essentially bring the grand jury investigation to a halt which would result in the non-prosecution of key players.

Later in the day on April 21, Judge McBryde ruled upon AUSA Umphres' latest motion. The order stated, "The material provided in the [government's] report and its attachments strongly indicates that one or more representatives of the United States of America has engaged in conduct calculated to frustrate the objectives of sentencing in this action and to cause noncompliance with the order signed by the court in this action on April 18, 1995." The order did not indicate that the government had raised the issue of the sealing order. Judge McBryde instructed AUSA Cerow, Postal Inspector Whiteaker, and defendant Satz to appear at an April 24 hearing and for the former two to bring with them all information potentially relevant to Satz's sentencing. The order stated that at the hearing the court would determine whether to proceed *in camera*.

On April 24, Judge McBryde began the first of three days of hearings on the *Satz* matter prior to sentencing. AUSA Cerow appeared with counsel from the Justice Department along with Inspector Whiteaker and defendant Satz. At this first hearing, Judge McBryde made clear his view that the government was attempting to manipulate the order of the Arizona and Texas sentencings in order to avoid double jeopardy problems. Judge McBryde ordered AUSA Cerow to turn over all information potentially relevant to sentencing Satz. In response, Cerow stated that three categories of information existed. The first was information generated in relation to a search warrant in Arizona.

The second was information protected by the secrecy requirement of Rule 6(e). The third was information covered by a sealing order entered by Judge Rosenblatt. Cerow turned over the information in the first two categories. But she declined to provide information in the third category and stated that she had not brought those documents from Arizona. Citing Judge Rosenblatt's sealing order, Cerow's attorney also declined on her behalf to comply with Judge McBryde's order. Inspector Whiteaker refused to comply as well and referred the court to the sealing order and to Cerow's previous instructions that he send all information in his possession to Arizona. Cerow's attorney told Judge McBryde only that the sealing order was written and dated March 27.

According to Judge McBryde, this was the first he had heard of any sealing order. He asked why Judge Rosenblatt had entered it and what its contents were. Cerow and her attorney responded that answering either question would violate the sealing order. When Judge McBryde pressed to know the contents of the sealing order itself, Cerow's attorney responded that he had asked Judge Rosenblatt earlier that day to make available a redacted copy of the order, but that Judge Rosenblatt had refused to do so. Cerow and her attorneys repeatedly suggested that Judge McBryde call Judge Rosenblatt directly; Judge McBryde declined, stating "it's to the point where I should not be in the position [of] trying to persuade Judge Rosenblatt to do things." Judge McBryde concluded the April 24 hearing by suggesting his inclination to issue a show-cause criminal contempt order against Cerow or to dismiss the charges against Satz, or both.

The next day, April 25, Judge McBryde resumed hearings. He ordered Inspector Whiteaker to tell him who was present at

the hearing when Judge Rosenblatt issued the sealing order. Inspector Whiteaker declined, citing the sealing order. Judge McBryde moved to a session *in camera*, ordered Satz and his attorney from the courtroom, and directed Cerow's attorney to tell the court more about the sealing order. Cerow's attorney stated that the order was written, was dated March 27, and was not entered in the Arizona *Satz* case. Cerow stated that the order had already prevented Judge McBryde from seeing information pertinent to Satz's sentencing. When Judge McBryde asked for further information, including the wording of Judge Rosenblatt's order, Cerow and her attorney also declined to answer. They stated that they had called Judge Rosenblatt the previous morning and asked him to release the sealed documents but that the Arizona judge had declined to make any information, including the wording of the sealing order, available for use in Fort Worth. After expressing his disappointment that the government had made no formal motion in Arizona to have the information released, Judge McBryde questioned Texas AUSA Umphres. Umphres disclosed that the Schwartzes, who had been mentioned in Satz's trial before Judge McBryde, were three of the targets of the investigation continuing in Arizona, and that certain defendants had pled guilty and were cooperating with the government. Umphres also stated that although he had known of the existence of a sealing order since early April, he had not known until the previous week that the Arizona U.S. Attorney's office was taking the position that the sealing order was as sweeping as AUSA Cerow's refusal to answer questions suggested.

Judge McBryde then moved back into public session and stated his belief that had there been a sealing order of the kind described by Cerow, he would have heard about it before the hearings began. Cerow responded that she had told Umphres of

the order in early April, and that in her view the disclosure of information contained in Umphres' first motion for a continuance, filed on April 4, itself violated Judge Rosenblatt's sealing order. Judge McBryde ordered a short recess.

When Judge McBryde resumed the hearings, Cerow's attorney stated that he had called Judge Rosenblatt again in an attempt to obtain confirmation on the sealing order. Judge Rosenblatt had apparently complied and faxed a short statement, the text of which read:

> On March 27, 1995, a criminal proceeding relating to a Northern District of Texas, Ft. Worth Division, 4:94-CR-094-A, [sic] was filed in this Court. All matters pertaining to that proceeding were placed under seal by this Court and will so remain.

Judge McBryde responded to this fax with the following comment: "It's so vague and general it doesn't tell me any more than I've already learned from the people here. It doesn't tell me that that order is of such a character that it would be intended to override the provisions of the [Sentencing G]uidelines and of [18 U.S.C. § 3661] concerning sentencing information I'm required to have for sentencing purposes."

At some point on April 25, Judge McBryde received an additional fax from Judge Rosenblatt. In this letter, Judge Rosenblatt addressed Judge McBryde as follows: "[I]f you decide to go forward with the sentencing, under the circumstances, please keep in mind that eventually [Satz] will be returned to [Phoenix] for sentencing and whatever you do might have ramifications on my sentence. I ask you to please consider this and not jeopardize my case or any other proceedings pending in my court" (alterations added). Also on April 25,

Judge McBryde again ordered Cerow to release the same information to the Fort Worth probation office. This order included a finding of fact that no sealing order preventing the disclosure of this information existed. In making this finding, Judge McBryde stated that he had relied upon the demeanor of AUSA Cerow and Inspector Whiteaker, the discrepancies in their testimony, the lateness of their reliance upon the sealing order as a reason to continue Satz's sentence, and the inherent implausibility of the proposition that one federal district judge would prevent another from using relevant information at a criminal sentencing.

Hearings resumed on April 26. After some further conversation, Judge McBryde stated that he interpreted Judge Rosenblatt's latest fax as verification that those in Phoenix were attempting to manipulate the order in which Satz was sentenced to prevent Satz from invoking double-jeopardy principles. After further discussion, Judge McBryde ordered the text of Umphres' second motion to continue sentencing unsealed and revealed to Satz and his counsel. The unsealing order reached the information filed under seal on April 21, including the attached exhibit disclosing the Schwartzes' guilty pleas and agreements to cooperate with the government to further the Arizona criminal investigation. The United States filed an emergency motion to stay the unsealing order, which this Court denied. Judge McBryde concluded the hearings with the following statements:

> I find that Darcy A. Cerow is in contempt of court in a number of respects. I find that she intentionally frustrated the objectives of my [April] 18, 1995 order directing that any additional information that has the potential to affect the

sentencing of Satz, such additional information be delivered to the probation officer . . . .

I find that Darcy A. Cerow is in contempt of court for causing a violation of the April 21, 1995 order of the court which directed that the United States of America have present at the hearing held in this action on April 24, 1995, all information that is potentially relevant to the sentencing of Satz in this action. The record reflects that she had possession and control of information that was potentially relevant to the sentencing of Satz in this action, and she consciously did not produce it.

I find that Darcy A. Cerow is in contempt of court for failing to comply with the (a) part of the order I signed yesterday, April 25 [because of the same conscious choice not to produce].

. . . . . .

I find that Darcy A. Cerow is guilty of contempt of court because of her failure to answer questions she was ordered to answer during the course of the proceedings . . . I find . . . that the contention by Ms. Cerow that she was prohibited by a secrecy order [from following the above orders] is a fabrication and is not true . . . .

I don't believe Ms. Cerow believes that any order that has been entered that prohibits her from delivering that information. I find that she does not believe that any order prohibited her from complying with my orders.

. . . . . .

The overall record reflects that all of this conduct and the waste of time we've had this week and leading up to this

> week has been a desire on the part of Ms. Cerow to have sentencing occur in the case in which she's a prosecutor first .... She's engaged in elaborate sets of activities in an effort to accomplish that, and in the course of doing so has engaged in falsehood and deception.

Judge McBryde concluded the hearing with a suggestion that the United States pursue an investigation of Cerow's conduct. The next day, Judge McBryde conducted Satz's sentencing hearing but did not sign a final judgment of sentence.

B

In October of 1990, a civil suit styled *Sanjuana Torres, Individually and . . . (Grecia Torres, A Minor) v. Trinity Industries, Inc.* by random assignment fell to Judge McBryde. The suit arose out of the death of Mr. Raimundo Torres, Grecia Torres's father. The parties settled, and Judge McBryde signed a final judgment on December 20, 1991. Judge McBryde ordered the defendant to pay $40,000 to Grecia Torres. The final judgment also ordered the Clerk of the Northern District to "invest the amount deposited in an interest bearing account at the highest available rate of interest" until Grecia Torres reached majority.

The clerk's office did not follow this order. The plaintiff's attorneys informed a financial deputy for the district court that depositing the funds in the U.S. would have adverse tax consequences for Grecia Torres and asked that the clerk hold the funds until the attorneys could set up a Mexican trust fund. Neither the attorneys nor the deputy followed up on this plan, and the $40,000 stayed in the court's treasury for more than three years earning no interest. Intervening audits of the clerk's office's accounts did not uncover the mistake. Nancy Doherty,

Clerk of the Northern District, testified at the eventual hearing of the Fifth Circuit Judicial Council's Special Investigative Committee that her office discovered the mistake in early March, but that she first contacted the Administrative Office of the United States Courts to find a solution to the problem before writing to Judge McBryde. On March 24, 1995, Clerk Doherty informed the attorneys for Grecia Torres of the error in writing and sent a copy to Judge McBryde. By this time, the Administrative Office had suggested that Grecia Torres' only remedy was through the Federal Tort Claims Act. That process would take approximately ten weeks.

Six days later, Judge McBryde issued an order in the Torres case. He explained that he did not agree that the FTCA was Grecia Torres' exclusive remedy:

> The court is disappointed that there would even be a suggestion that Grecia Torres, a minor, acting through a person or persons who might legally be qualified to act on her behalf, would be required to go to the time and expense to exhaust administrative remedies, through a tort claims process, before being able to obtain relief from violation of an order of this court . . . . If such order of this court is to have any integrity, enforcement of the order should be the means of causing Grecia Torres to be made whole for loss resulting from violation of the order (assuming that the clerk is unwilling or unable on her own initiative to take proper corrective measures by causing a sufficient deposit to be made to the minor plaintiff's account).

Judge McBryde's order directed Clerk Doherty to file an analysis and supporting documents to determine the amount of interest Torres had lost.

At the suggestion of Judge Buchmeyer,[2] Clerk Doherty responded by letter to Judge McBryde, attaching the requested financial information. Following his suggested language, despite her stated reservations that the phrasing would anger the court, the letter expressed shock and disappointment that Judge McBryde felt it necessary to enter an order to resolve the matter. The letter also informed Judge McBryde that the Clerk's office, the Administrative Office, and the plaintiff's attorneys were working together to reimburse Torres' account via an FTCA action. According to Clerk Doherty, Grecia Torres's interest income would have been between $3,762.68 and $8,112.58, depending on how the clerk's office had decided to invest.

On April 25, Judge McBryde responded with a second order. This order labeled Clerk Doherty's letter in response "so unprofessional and so disrespectful of the undersigned judge and court, and manifest[ing] such a high level of insolence, that it borders on, if it does not constitute, contempt of court by one of its statutory officers." In a long footnote, the order accused Doherty of "insolence," "lack of respect," attempting to "avoid direct confrontation of the consequences of noncompliance with the judgment," and a "lack of understanding [of] the court's responsibilities." The order further suggested that Doherty was "collaborating with the attorney for the plaintiffs in pursuing a remedy that . . . the court considers to be inappropriate." The

---

[2]Chief Judge Buchmeyer's memorandum opinion in *Torres* indicated that he had become aware of the case when Clerk Doherty came to him seeking advice in how to respond to Judge McBryde's March 30 order. The Chief Judge also stated that he became aware of the *Satz* case when members of a United States Attorney's office approached him to ask his assistance in having an appellate judge available to consider an application for a writ of habeas corpus directing the release of AUSA Cerow, should Judge McBryde hold her in contempt.

order concluded by striking Doherty's last letter and ordering her to file into the *Torres* record additional documentation designed to calculate the amount of interest income lost to the Torres account.

C

1

On April 27, Judge Buchmeyer, Chief Judge of the Northern District of Texas, entered orders vacating Judge McBryde's order of April 25 and reassigning the *Torres* case from Judge McBryde to himself. On May 1, Judge Buchmeyer issued a second order vacating Judge McBryde's findings as to contempt and reassigning the *Satz* case from Judge McBryde to himself. Both orders were filed under seal. Judge Buchmeyer sealed the entirety of the *Satz* and *Torres* files. Both orders cited 28 U.S.C. § 137 as authority to reassign the cases. The timing of the events and the testimony of Judge McBryde before the Special Investigatory Committee suggest that Judge Buchmeyer did not have the transcripts, orders, or supporting documents available to him in either case when he entered his orders reassigning the cases to himself and vacating Judge McBryde's prior actions. Judge Buchmeyer testified that he spoke only with AUSA Umphres, never with Cerow or her attorney.

On May 3, Judge McBryde entered an order calling reassignment of the *Satz* case "rash conduct" and concluding that the May 1 order was "void in its entirety." On the same day, Judge McBryde signed a judgment of conviction and sentence for Satz. The next day, Chief Judge Buchmeyer issued an additional order resealing the entire Satz file, declaring Judge McBryde's May 3 order void in its entirety, and directing the clerk to file only materials signed by Judge Buchmeyer in the *Satz* case. By

"dear colleague" letters dated May 1 and 4, Judge Buchmeyer informed the other judges of the Northern District of Texas of his actions.

On May 12, 1995, defendant Satz filed a petition for a writ of habeas corpus, stating that he currently stood imprisoned without having been sentenced. The petition recited that Chief Judge Buchmeyer had reassigned *Satz* to himself, but that Judge McBryde had signed the sentencing order. Two months later, Judge Buchmeyer denied Satz's petition on the ground that Judge McBryde had vacated the May 1 Buchmeyer reassignment order before signing the judgment of conviction and sentence, and Satz was thus imprisoned pursuant to a valid judgment and sentence. Satz apparently did not appeal this ruling. *See Gray*, 105 F.3d 956.

On August 25, Judge Buchmeyer filed an opinion and order in the *Satz* case. The order reflects a review of the transcripts of the *Satz* hearings held on April 24-26. The order also relied upon a letter, written at the request of Chief Judge Buchmeyer, from Janet Napolitano, United States Attorney for the District of Arizona. The letter commented on the effects of Judge McBryde's orders. It is unclear what if any additional information was available to him, although it does not appear that Judge Buchmeyer heard additional sworn testimony.

Judge Buchmeyer found that the representations of AUSA Cerow and her attorney, as well as the statements made by Inspector Whiteaker, during the April 24-26 hearings were entirely truthful. He also stated that Judge McBryde's treatment of Judge Rosenblatt constituted an "unwarranted attack." The order described Judge McBryde's April 26 decision to unseal the text of the second motion to continue and attached documentation filed by AUSA Umphres on April 21 under seal. In

a footnote, the order stated that "[a]ccording to *Janet Napolitano*, United States Attorney for the District of Arizona, this disclosure by Judge McBryde 'undermined the new [grand jury] *investigation since, by informing Satz of the nature of the Arizona investigation, the Court also informed the targets of that investigation. Consequently, several persons will probably avoid prosecution altogether . . .*'" (alteration and italics in original).[3]

The asserted damage to the grand jury investigation was apparently due to the disclosure of information in the attachment to the April 21 motion. Attached as Exhibit A, the memorandum from AUSA Umphres to the Probation Office disclosed that certain defendants were cooperating in the investigation. On the basis of this disclosure, United States Attorney Napolitano and AUSA Cerow concluded that defendant Satz would warn the targets of the Arizona investigation and that those individuals would move or destroy documents, and therefore that they could not in good faith apply for a warrant to search for those documents. Curiously, this effect of Judge McBryde's order is asserted in spite of disclosures made by AUSA Umphres' first motion for a continuance, filed on April 4 not under seal and presumably served on Satz's attorney. This first motion had disclosed the fact that the Arizona investigation had focused in part on the Schwartz family, had generated a significant record, and had revealed the possibility that Satz was more involved in the criminal enterprise than had been previously believed. Documents filed before this court suggest that the docket sheets in the Schwartz family criminal

---

[3]AUSA Cerow testified at the eventual hearing before the Special Investigatory Committee that at least one person, whom she did not identify, had escaped prosecution altogether.

prosecutions were available to the general public throughout the pendency of this litigation via an Arizona computer system. These docket sheets reflected the Schwartzes' guilty pleas and the sealing of their cases.

Judge Buchmeyer's order continued by stating that Judge McBryde had repeatedly rejected the government's suggestions that he call Judge Rosenblatt or grant a continuance. The order continued, "In lieu of a continuance, the government suggested that Judge McBryde review material in camera so that public disclosure would not be made. He rejected that option." Chief Judge Buchmeyer concluded the opinion by admitting that 28 U.S.C. § 137 did not grant him the power to "*reassign cases because of a disagreement with how a case was handled* . . . [or] because litigants are disgruntled, or because of some desire to place [him]self in the role of a 'quasi-appellate court' that reviews the decisions made by other judges in this district" (italics in original). Labeling any such argument in this case "ridiculous," Judge Buchmeyer explained that this case was "*an extraordinary situation*" (italics in original) because Judge McBryde made an unwarranted attack upon Judge Rosenblatt and because Judge McBryde had jeopardized a grand jury investigation by unsealing information as a direct result of clearly erroneous findings of fact.

In a separate order also issued in August, Judge Buchmeyer granted the United States' previously filed "Motion for Clarification." The order recited the potential difficulties under *Giglio v. United States*, 405 U.S. 150, 153-54, 92 S.Ct. 763, 765-66, 31 L.Ed.2d 104 (1972), and *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), created by Judge McBryde's findings that AUSA Cerow and Inspector Whiteaker had lied while under oath. The order vacated these

findings as having "no factual basis" and found that "AUSA Cerow and Inspector Whiteaker were at all times truthful in their dealings with Judge McBryde." This obviated the need for any effort to obtain review by this Court of Judge McBryde's order, the reason representatives of the United States Attorney's office consulted Judge Buchmeyer in the first place.

2

On July 21, Judge Buchmeyer filed another memorandum in the *Torres* case labeling the reassignment of that case necessary "to avoid public humiliation and damage to the District Clerk, as well as to the reputation of this Court." After detailing the facts, the Chief Judge referred to his opinion in *Satz* and again rested his reassignment order on 28 U.S.C. § 137.

D

After a meeting of the judges of the Northern District of Texas, about which the documents before us provide little information, Judge McBryde filed a "Request for Assistance in Resolution of Dispute" before the Fifth Circuit Judicial Council. Apparently, the Department of Justice also wrote Fifth Circuit Chief Judge Politz regarding *Satz*. Chief Judge Politz ordered that the Request for Assistance be referred to a "Special Investigatory Committee," which would also consider matters arising out of the DOJ's letter pursuant to 28 U.S.C. §§ 372(c)(1) & 372(c)(5). The committee, comprised of three circuit judges and two district judges, held a hearing on October 19. It heard testimony from Judge McBryde, but refused his request to be present at the taking of the testimony of witnesses, including Judge Buchmeyer. One member of the committee expressed concern that the transfers by Judge Buchmeyer could effect an end-run around the appellate process. In response,

Judge Buchmeyer emphasized that an appeal of contempt in the *Torres* case would result in unacceptably damaging media exposure for Clerk Doherty and that he had a responsibility to protect the clerk of his court, as well as Judge Rosenblatt, who might not have had any remedy for Judge McBryde's "abuses."

Clerk Doherty and AUSA Cerow also testified before the committee. The committee then presented a recommendation to the Fifth Circuit Judicial Council. The documents before us do not describe the nature of this untranscribed presentation.

On October 20, the Judicial Council denied Judge McBryde's Request for Assistance by an order stating:

> Our review of the record along with our independent investigation in these two cases overwhelmingly demonstrates that Judge Buchmeyer's factual predicate, on which he based his orders, was correct. Judge McBryde's conduct in both cases was unwarranted.
>
> In *Satz*, Judge McBryde's attack on AUSA Darcy A. Cerow and Postal Inspector Rex Whiteaker and his accusations against them of lying and contempt of court were baseless, threatening irreparable damage to the professional reputations and careers of both Ms. Cerow and Mr. Whiteaker. The record and our investigation confirm that the statements and conduct of AUSA Darcy Cerow and Postal Inspector Rex Whiteaker were truthful, professional, and appropriate under the circumstances. In addition, Judge McBryde's refusal to accord proper respect to the orders of another United States District Judge which sealed sensitive Rule 11 proceedings undermined a grand jury investigation.
>
> In *Torres*, our investigation and the record confirmed that Judge McBryde's conduct against Nancy Doherty, the clerk

> of the Northern District of Texas, was unwarranted, abusive, and threatened to damage Ms. Doherty's professional reputation. We are persuaded that Ms. Doherty took appropriate action upon being advised of the problems regarding the deposit of funds held for the minor and conducted the affairs of her office in a professional manner.
>
> We need not decide whether 28 U.S.C. § 137 authorized Chief Judge Buchmeyer's action in reassigning these cases because the Judicial Council unanimously concludes that Judge McBryde's above described conduct is an impediment to the effective administration of justice. Therefore under the authority of 28 U.S.C. § 332 we reassign *Satz* and *Torres* to Chief Judge Buchmeyer effective May 1, 1995 and April 27, 1995.

Although Judge McBryde never acquiesced in the transfers, the Council did not seek enforcement of its order in the district court. In practical and real terms, enforcement of the Council's order had already been accomplished by the combined effect of the order of the district court and the later order of the Council, tailored to reach back to the original date of each of the district court's orders transferring the cases. Judge Buchmeyer, who already claimed that *Satz* and *Torres* were on his docket based on his power under § 137, retained the cases without entering any formal acknowledgment of the Council's reassignments.

II

We pause to note that the conflict between Judge McBryde on the one hand and Judge Buchmeyer and the Council on the other hand began as a struggle between conflicting interpretations of the facts. As we read the record, finders of fact could reasonably defend either side. The reasonableness of both

understandings does not play a determinative role in our legal analysis, but appreciating the roots of this case leads to an appreciation of the power that the Chief Judge of the District and the Council exercised when they took the *Satz* and *Torres* cases away from Judge McBryde.

Chief Judge Buchmeyer and the Council chose to believe AUSA Cerow's insistence that Judge Rosenblatt's sealing order prohibited her from answering Judge McBryde's questions. Judge Rosenblatt's two faxes confirmed that there was a sealing order, and their curtness suggested that its scope was broad. From the point of view of Chief Judge Buchmeyer and the Council, Judge McBryde's reputation for running a tight ship made these litigants wary of giving him information, which in turn made Judge McBryde suspicious and caused an escalation of distrust. It was not unreasonable for Chief Judge Buchmeyer and the Council to attribute difficulties in the *Satz* case to misunderstandings and to give credence to AUSA Cerow based on the evidence of the sealing order and the presumption that an attorney would not fabricate the contents of a judicial order.

In *Torres*, Judge McBryde threatened Clerk Doherty with contempt based on her "insolence" and accused her of conspiring with the plaintiffs' attorney to institute a cumbersome remedy in violation of instructions from the court. As a behind-the-scenes participant, Judge Buchmeyer had valid reasons to dismiss Judge McBryde's suspicions. Indeed, he knew that he himself was the author of the remarks that Judge McBryde viewed as insolent. The Council adopted Judge Buchmeyer's view of Clerk Doherty's actions, seeing her as a well-meaning public servant attempting to smooth over a bureaucratic glitch.

But we cannot dismiss out of hand Judge McBryde's understanding of the facts in the *Satz* and *Torres* cases either. His suspicions in *Satz* were understandably heightened when, during the second day of hearings, Umphres stated that he did not know until the latter part of April that the Arizona U.S. Attorney's office was portraying the sealing order as protecting virtually every piece of information about the Arizona *Satz* litigation. In retrospect, Judge McBryde could piece together a number of facts that pointed to the larger conclusion that AUSA Cerow was lying. Umphres's first motion to continue sentencing was not filed under seal even though it mentioned the Schwartz family and the further investigations. Umphres's second motion to continue sentencing was filed under seal, but the attached letter from AUSA Cerow suspiciously neglected to mention any sealing order as a reason to keep the Arizona grand jury investigation a secret. Even after moving the hearing *in camera* and excluding Satz's counsel, AUSA Cerow and her attorney were extraordinarily reticent about information Judge McBryde needed for sentencing. They refused even to disclose the wording of the order. Judge Rosenblatt was understandably cautious. The result was that dispatches from Judge Rosenblatt were vague and hardly falsified Judge McBryde's hunch that AUSA Cerow was being less than forthright. At the April 25 proceedings, Judge McBryde delivered a cogent statement of his reasons for rejecting AUSA Cerow's reliance on a broad sealing order. His conclusion flowed not only from the implausibility of such an order and the fact that the government raised the order long after it knew it would be relevant, but also from the demeanor of the witnesses and counsel's evasiveness.

Judge McBryde knew that AUSA Cerow had an incentive to delay sentencing in the Northern District of Texas. According to the government's own motions, sentencing in the Fort Worth

case might, under Ninth Circuit law, limit the sentences available in the Phoenix case. Both the government and Judge Rosenblatt apparently expected Judge McBryde to hold off on sentencing in order to ensure that Satz would receive as much punishment as possible. The delaying tactics might also have been due to AUSA Cerow's interest in obtaining sentences in her case before the Northern District of Texas handed down sentences. We need not attribute paranoia or irrationality to Judge McBryde to explain his view that AUSA Cerow's contentions about the sealing order were untruthful. Even if there was a sealing order, there were legitimate reasons to think that its scope was not as sweeping as AUSA Cerow contended.

Judge McBryde's understanding of the factual basis for suspecting that Clerk Doherty was on the verge of contempt was similarly within the bounds of reason. He knew that the $40,000 had earned no interest because plaintiffs' counsel requested the clerk's office not to deposit the money in a U.S. account and that the clerk's office had complied, contrary to Judge McBryde's express order. He also knew that Clerk Doherty was cooperating with the Administrative Office to accomplish an end that his prior order rejected. Furthermore, from Judge McBryde's vantage point, Doherty did not respect his position enough to refrain from criticizing his earlier order in a letter to the court. Judge McBryde could have handled the matter more sensitively. We need not agree with his conclusion to conclude that his view of the letter as reflecting "insolence" was not irrational. It is evident that the tone of language used by the Chief Judge differed significantly from the tone Clerk Doherty would have preferred. She is an experienced clerk with an outstanding reputation. Part of her success has undoubtedly been an ability to handle the egos that sometimes flourish under the shelter of Article III. In short, the choice of language was no

fault of the clerk, but Judge McBryde had no way to know that. As in the *Satz* case, there was room for disagreement about whether those on the receiving end of Judge McBryde's barbs acted culpably.

III

Judge McBryde invokes 28 U.S.C. § 1651(a) in his petition for a writ of mandamus, and that is ultimately where our jurisdiction rests. Section 1651(a) authorizes this court to issue all writs "necessary and appropriate in aid of [its] jurisdiction." Establishing jurisdiction to entertain Judge McBryde's petition requires that we answer two questions. First, do we have jurisdiction to issue a writ to the Judicial Council? If not, can we entertain Judge McBryde's suit based on our jurisdiction over the Northern District of Texas? Only after we have established our jurisdiction to issue a writ can we examine the propriety of the orders to which Judge McBryde objects.

A

This court has joined the D.C. Circuit in interpreting section 1651(a) as not authorizing a court of appeals to issue a preemptory writ regarding a case over which it would never have appellate jurisdiction. *Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants*, 17 F.3d 130, 133 (5th Cir.1994) ("As we have no statutorily conferred jurisdiction over the actions of the Director, the All Writs Act would not provide this Court with jurisdiction to compel action by the Director."); *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 79-80 (D.C.Cir.1984); *In re Stone*, 569 F.2d 156, 157 (D.C.Cir.1978).[4]

---

[4]These cases did not decide the inherent power of federal courts, power not emanating from § 1651(a), to issue preemptory writs to any official of

We have no direct appellate jurisdiction over the Council's order. We have only the jurisdiction that Congress grants us by statute. Despite the suggestions of Justices Harlan, Black, and Douglas in *Chandler*, 398 U.S. at 111-117, 133-135, 90 S.Ct. at 1667-1670, 1679-1680,[5] the circuits have long since concluded that section 1651(a) is not an independent grant of jurisdiction.[6]

---

the United States upon a showing of clear entitlement to relief. Such a power might be derived from the historical ability of the common law courts to compel the performance of ministerial duties by those, such as executive officials, whose actions are not normally the subject of appellate review. *See Chandler v. Judicial Council of the Tenth Circuit of the United States*, 398 U.S. 74, 111-117, 90 S.Ct. 1648, 1667-1670, 26 L.Ed.2d 100 (1970) (Harlan, J., concurring). However, we abstain from exercising any inherent power we may have in this case. Congress has expressed a preference that the district courts exercise this type of general power. *See* 28 U.S.C. § 1361 ("The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."); *see also La Buy v. Howes Leather Co.*, 352 U.S. 249, 265-66, 77 S.Ct. 309, 318-19, 1 L.Ed.2d 290 (1957) (Brennan, J., dissenting). *But see In re Imperial "400" National, Inc.*, 481 F.2d 41, 42 (3d Cir.) (affirming a district court's conclusion that it lacked jurisdiction to mandamus a judicial council), *cert. denied*, 414 U.S. 880, 94 S.Ct. 71, 38 L.Ed.2d 125 (1973). To the extent that Judge McBryde wishes to invoke the modern analogy to the historical power of the common law courts, he has gone to the wrong court.

[5]*See also United States v. Malmin*, 272 F. 785, 791 (3d Cir.1921) (holding that the predecessor to § 1651, which did not include the "necessary in aid of their jurisdiction" language, provided the court with jurisdiction to issue a writ to an unlawfully ousted district judge ordering him to resume his duties).

[6]*See, e.g., White v. NFL*, 41 F.3d 402, 409 (8th Cir.1994), *cert. denied*, 515 U.S. 1137, 115 S.Ct. 2569, 132 L.Ed.2d 821 (1995); *Telecommunications Research*, 750 F.2d at 77; *Baker Perkins, Inc. v. Werner & Pfleiderer Corp.*, 710 F.2d 1561, 1565 (Fed.Cir.1983); *Starbuck v. City & County of San Francisco*, 556 F.2d 450, 459 n. 18 (9th Cir.1977); *Commercial Security Bank v. Walker Bank & Trust Co.*, 456 F.2d 1352, 1355 (10th Cir.1972); *see*

Nor do we have appellate jurisdiction by virtue of some other statute. Section 372(c)(10) of Title 28 grants appellate jurisdiction over certain judicial council action to the Judicial Conference of the United States, not to this court.[7] Judge McBryde identifies no statute granting a right of review of Judicial Council action to this court, and we have found none.

Mandamus might lie if we view the Council as an administrative body subservient to the judiciary. A collection of employees facilitates the work of the courts. Clerks, sheriffs, and bailiffs are prime examples. The courts have power over these officers simply because they are instruments through which the courts function. Power springs in part from statute but also in part from the nature of the administrative services these officers perform and their inherently subordinate role within the system.

Some authority supports the theory that the Judicial Council is an administrative body subordinate to the Fifth Circuit. The

---

also Chandler, 398 U.S. at 86, 90 S.Ct. at 1654 (majority opinion) ("As the concurring and dissenting opinions amply demonstrate, finding the prerequisites to support a conclusion that we do have appellate jurisdiction in this case would be no mean feat.").

[7] Note that if one treats the Council's action against Judge McBryde as a complaint under 28 U.S.C. § 372(c), in spite of the Council's failure to provide the procedural safeguards specified in 28 U.S.C. § 372(c)(11), then Congress has made crystal clear its intent that the federal courts as such exercise no appellate jurisdiction. 28 U.S.C. § 372(c)(10) ("Except as expressly provided in this paragraph, all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise."). *See also United States v. Washington*, 98 F.3d 1159, 1164-65 & n. 2 (9th Cir.1996) (Kozinski, J., concurring) (noting that litigants who believe a judge suffers from a mental disability must complain to the circuit judicial council and can obtain review of the council's decision only from the Judicial Conference), *petition for cert. filed*, 65 U.S.L.W. 3713 (U.S. Apr. 7, 1997) (No. 96-1607).

Chandler court characterized judicial councils as administrative bodies in dicta. 398 U.S. at 86 n. 7, 90 S.Ct. at 1655 n. 7. On occasion, the circuits have agreed. *See, e.g., Henry v. United States*, 432 F.2d 114, 119-20 (9th Cir.1970) ("It is true that members of a Court of Appeals, meeting as a Judicial Council, exercise certain supervisory powers for the expeditious administration of the business of the courts within its circuit, but they act as a council, not a court."), *modified*, 434 F.2d 1283, *cert. denied*, 400 U.S. 1011, 91 S.Ct. 576, 27 L.Ed.2d 625 (1971); *see also In re Petition to Inspect & Copy Grand Jury Materials*, 735 F.2d 1261, 1271 (11th Cir.), *cert. denied*, 469 U.S. 884, 105 S.Ct. 254, 83 L.Ed.2d 191 (1984). In addition, the function assigned to the Council suggests that it is analogous to a clerk or a bailiff, in that both assist in the process of orderly decisionmaking accomplished by the court. *See* 28 U.S.C. § 332(d)(1) (providing that each judicial council should make orders as necessary for the effective administration of justice).

The presence of circuit and district judges on the Council adds nothing to our power. It would not matter if the Council were composed of the nine members of the Supreme Court; when the Justices acted in their capacity as members of the Council, their power and role would be that of the Council, not of the Supreme Court.

Even if the Judicial Council often or even primarily acts as a subordinate administrative body, it acted as a court in this case. "'A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist.'" *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 477, 103 S.Ct. 1303, 1311, 75 L.Ed.2d 206 (1983) (quoting *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 224, 29 S.Ct. 67, 68, 53 L.Ed. 150 (1908)).

That is exactly what the Council did here. *See In re Petition*, 735 F.2d at 1271 (holding that a judicial council disciplinary proceeding is closely analogous to a "judicial proceeding" within the meaning of Fed.R.Crim.P. 6(e)(3)(C)(i)).

Other characteristics of the Council's actions in this case suggest that this proceeding was judicial in nature. The Special Investigative Committee took sworn testimony and examined the records of actual cases. It issued an order transferring a case from one judge to another because of alleged misconduct, just as the circuits have done in the past. *See, e.g., United States v. Jacobs*, 855 F.2d 652, 656-57 (9th Cir.1988) (holding that a judge's misconduct in a particular case warranted reassignment). The stigmatizing effect of the comments issued in the context of the Judicial Council's order support an analogy to disbarment proceedings, which courts have characterized as judicial. *In re Palmisano*, 70 F.3d 483, 484-85 (7th Cir.1995) (characterizing disbarment proceedings as judicial while deciding whether an appeal from such proceedings lies to the circuit or to the circuit council), *cert. denied*, --- U.S. ----, 116 S.Ct. 1854, 134 L.Ed.2d 954 (1996). In this regard, it is no accident that all members of the judicial councils enjoy Article III status; separation of powers principles might not permit a body otherwise composed to exercise some of the powers the Council has at its disposal, including those exercised in this case.

Whether the Judicial Council is an arm of the executive branch or the judiciary is irrelevant to the question of our appellate jurisdiction. *See Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 224, 29 S.Ct. 67, 68, 53 L.Ed. 150 (1908) (defining a "judicial inquiry"). Even if the Council functioned as an Article III body — a conclusion that one might reach on

the basis of the Article III status of its members as well as the nature of the order it entered — it functioned as a body over which we lack *direct* appellate jurisdiction. By analogy, we lack jurisdiction over district courts outside of this circuit, and thus cannot issue mandamus running to them. The question of whether the Judicial Council is a judicial body, or functioned as a judicial body in this case, is of importance only if Judge McBryde should seek relief in the Supreme Court. *See Chandler*, 398 U.S. at 86, 111-117, 133-135, 90 S.Ct. at 1654-1670, 1678-1679.

We conclude that the facts presented in this case do not permit us to issue a writ of mandamus directly to the Council. We need not decide whether other cases might present circumstances amenable to the exercise of direct scrutiny of council decisions under the All Writs Act.

B

[1] That we lack both direct appellate jurisdiction over the Council's order and inherent jurisdiction to issue a writ of mandamus directly to the Council as an administrative body of this court does not deprive us of jurisdiction to entertain Judge McBryde's petition for a writ of mandamus running to the Northern District of Texas or its Chief Judge. The All Writs Act gives us jurisdiction to issue a writ of mandamus to Chief Judge Buchmeyer. The inescapable fact is that orders issued under § 332 are enforceable only through the district court, and, of course, we can review the actions of the Northern District of Texas.

The Council's retroactive order transferring *Satz* and *Torres* to Chief Judge Buchmeyer could do nothing more than instruct the Northern District of Texas to enter such an order. The

Council may issue necessary orders, but these two cases were not pending before the Council. It is no empty formalism to acknowledge that the Council's orders are implemented by the district court. By necessity, the Council's order was a directive to the district court. Because the only orders transferring cases came from within the Northern District of Texas, our inability to issue a writ of mandamus to the Council does not stand in the way of our entertaining Judge McBryde's petition.

Practical mechanics aside, under the Council's organic statute, the order the Council entered in this case was a directive to the Northern District of Texas to put the Council's instructions into effect. Nothing in 28 U.S.C. §§ 331- 335, which create and govern the judicial councils, can be read to empower the Council to issue a self-executing order transferring cases from one district court judge to another. Rather, judicial officers and employees of the circuit are to "promptly carry into effect all orders of the judicial council." 28 U.S.C. § 332(d)(2). The statute requires that a judicial council look to the courts to enforce compliance with its orders; a council can remedy a failure to comply with its orders only by "institut[ing] a contempt proceeding in [a] district court in which the judicial officer or employee of the circuit who fails to comply with the order . . . shall be ordered to show cause before the [district] court why he or she should not be held in contempt." *Id.* The mechanism in § 372 differs fundamentally from the mechanism in § 332. For example, § 372 contemplates council orders suspending further assignment of cases to a judge under investigation for misconduct. *See* 28 U.S.C. § 372(c)(6)(B)(iv). It does not mention enforcement through ordinary judicial channels.[8] Instead, it authorizes a council to notify a judge

---

[8]There is one isolated exception to the absence of ordinary judicial

under investigation directly of its actions. 28 U.S.C. § 372(c)(6)(D). These separate statutory structures highlight the central role of the district court in effecting council decisions made under the rubric of § 332. Significantly, Congress has not withdrawn jurisdiction to consider the validity of council orders issued under § 332 for which enforcement is sought. By contrast, it did so with § 372 proceedings. *See Webster v. Doe*, 486 U.S. 592, 603, 108 S.Ct. 2047, 2053, 100 L.Ed.2d 632 (1988) ("[W]here Congress intends to preclude judicial review of constitutional claims, its intent to do so must be clear."); *Yakus v. United States*, 321 U.S. 414, 430-31, 64 S.Ct. 660, 669-70, 88 L.Ed. 834 (1944) (holding that Congress "gave clear indication that the validity of the Administrator's regulations or orders should not be subject to attack in criminal prosecutions").

Our jurisdictional analysis is unaffected by the fact that Judge Buchmeyer's orders were entered before the Council's decision. By affirming the factual predicate of transfer orders first issued by the district court and making its purported transfer orders effective on the dates of his original transfer orders, the Council has achieved enforcement of its retroactive order. Our jurisdiction in this case, then, runs not to a direct examination of the Council's order, but rather to an examination of the judicial officers' or employees' actions in implementing that order. Whatever the Council's order purported to do, the Council could not under § 332 itself move the cases over the objection of Judge McBryde to Chief Judge Buchmeyer.

We review the transfer of the cases as acts of officers of the Northern District of Texas, and we review the propriety of the

---

enforcement from § 372. Section 332(d)(2) allows a council or a special investigative committee formed under § 372(c)(4) to pursue contempt proceedings to force compliance with a subpoena.

Council's order only insofar as it may justify or fail to justify the officers' actions. *See In re Imperial "400" National, Inc.*, 481 F.2d 41, 42 (3d Cir.) (noting that a circuit court may indirectly review the action of a judicial council in the process of reviewing a district court's order), *cert. denied*, 414 U.S. 880, 94 S.Ct. 68, 38 L.Ed.2d 125 (1973).[9]

The Tenth Circuit has by mandamus voided assignment of a case to an improper district judge, as we would do here. *Utah-Idaho Sugar Co. v. Ritter*, 461 F.2d 1100 (10th Cir.1972); *Kerr-McGee Corp. v. Ritter*, 461 F.2d 1104 (10th Cir.1972). In *Utah-Idaho* and *Kerr-McGee*, a chief judge of a district assigned himself certain cases in violation of an order of the Tenth Circuit Judicial Council. The Tenth Circuit found that a "writ of mandamus is essential to continuation of fair division of cases within the District of Utah and in implementation of the prior orders of the Judicial Council." *Utah- Idaho*, 461 F.2d at 1104. Although the Tenth Circuit did not articulate a theoretical justification for the use of the mandamus device in these cases, such an articulation is not difficult. Since *La Buy v. Howes Leather Co.*, 352 U.S. 249, 77 S.Ct. 309, 1 L.Ed.2d 290 (1957),

---

[9]Although there is some authority to the contrary, the circuits have regularly met challenges to a judicial council's actions on the merits without hint that council decisions are immune from ordinary judicial scrutiny. *In re Burley*, 738 F.2d 981, 985 (9th Cir.1984); *White Motor Corp. v. Citibank, N.A.*, 704 F.2d 254, 262 (6th Cir.1983); *Hilbert v. Dooling*, 476 F.2d 355, 359-62 (2d Cir.), *cert. denied*, 414 U.S. 878, 94 S.Ct. 56, 38 L.Ed.2d 123 (1973); *Jimenez v. Aristeguieta*, 311 F.2d 547, 554 (5th Cir.1962), *cert. denied*, 373 U.S. 914, 83 S.Ct. 1302, 10 L.Ed.2d 415 (1963). *But see In re Imperial "400"*, 481 F.2d at 50 (Lumbard, J., dissenting) ("No district judge or panel of the Court of Appeals for the Third Circuit, no matter how constituted, has the power to question the action of the Judicial Council of the Third Circuit.").

the courts of appeals have possessed the power to issue supervisory writs of mandamus in order to prevent practices posing severe threats to the proper functioning of the judicial process. *See also Mallard v. United States District Court*, 490 U.S. 296, 309, 109 S.Ct. 1814, 1822, 104 L.Ed.2d 318 (1989) (describing the broad power available to the federal appellate courts under the supervisory writ doctrine). As we will illustrate, transferring *Satz* and *Torres* from Judge McBryde threatened the proper functioning of the judicial process here because reassignment of cases in response to disagreement with substantive rulings pertaining to those cases threatens the very structure of the federal court system. The Council is not an appellate court with a correlative power to transfer cases, and Chief Judge Buchmeyer as a district judge lacks the power of appellate review over his fellow district court judges.

[2] Because Judge McBryde was not a litigant in either the *Satz* or *Torres* cases, the Council questions whether he has standing. Initially, we agree with Justice Harlan that this type of petition is a case or controversy in the constitutional sense. *See Chandler*, 398 U.S. at 106 n. 9, 90 S.Ct. at 1663 n. 9 (Harlan, J., concurring). Judge McBryde may not have a constitutionally protected property or liberty interest in his ability to adjudicate *Satz* and *Torres*. Nevertheless, his interest in deciding those cases free from the specter of interference, except by the ordinary process of appellate review, is one that Congress might constitutionally recognize and protect without running afoul of the limits of Article III. *Cf. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576-77, 112 S.Ct. 2130, 2145-46, 119 L.Ed.2d 351 (1992). Moreover, the damage done to Judge McBryde's reputation, which probably would be redressed in part by a finding of this court that his actions were not within the power of Chief Judge Buchmeyer or the Judicial Council to

remedy, 28 U.S.C. § 332(d)(1), is also sufficient to confer standing on Judge McBryde.

[3] The fact that the district-court phases of the *Satz* and *Torres* matters have been completed is no barrier to our review of the transfers. In both cases, Judge McBryde was considering whether to issue contempt citations. That avenue will still be open to him if we return the cases to his docket. *See* 18 U.S.C. § 401; Fed.R.Crim.P. 42(b). At this stage, we make no comment on whether contempt proceedings would be wise. It is enough to note that Judge McBryde has the authority to make the initial determination of whether the conduct of AUSA Cerow or Clerk Doherty merits his further attention.

In sum, although this court lacks jurisdiction to issue mandamus to the Judicial Council, we have jurisdiction to issue mandamus to Chief Judge Buchmeyer and the officers of the Northern District of Texas insofar as we must do so "in aid of" the appellate jurisdiction of the Fifth Circuit. 28 U.S.C. § 1651(a). This follows from our conclusion that the Council has obtained enforcement by the district court insofar as its order rested on § 332. If we were to take the view that the Council has not obtained enforcement of its order by the district court and insist on the empty exercise of an application by the Council for enforcement, Chief Judge Buchmeyer's orders would stand alone because there would be no extant order of the district court enforcing the Council's order. As we will explain, his orders are not enforceable.

IV

[4] Chief Judge Buchmeyer purported to exercise his authority under 28 U.S.C. § 137 when he assigned *Satz* and *Torres* to himself. That section provides:

> The business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court.
>
> The chief judge of the district court shall be responsible for the observance of such rules and orders, and shall divide the business and assign the cases so far as such rules and orders do not otherwise prescribe.
>
> If the district judges in any district are unable to agree upon the adoption of rules or orders for that purpose the judicial council of the circuit shall make the necessary orders.

A plain reading of the statutory text requires us to answer two questions: First, whether there is a rule or order adopted either by the Northern District of Texas or the Judicial Council of the Fifth Circuit that governs the reassignment of cases; and, second, whether the chief judge's power to "assign the cases so far as such rules and orders do not otherwise prescribe" validates the assignment.[10]

While the parties point to no rule or order expressly governing the reassignment of cases in the Northern District of Texas, Special Order No. 3- 130 provides that "civil and criminal cases in the Fort Worth Division will be assigned by random draw," with 44% of the Division's cases going to Judge McBryde.

Chief Judge Buchmeyer read Special Order No. 3-130 to govern only the initial assignment of cases in the Fort Worth Division, not their reassignment, a distinction we conclude to be too fine. In *Utah-Idaho*, the chief judge of the district reassigned several cases pending before a judge who had recently

---

[10]The Judicial Council's answer to Judge McBryde's petition for mandamus did not address the propriety of Chief Judge Buchmeyer's order.

taken senior status. A litigant from one of the reassigned cases sought a mandamus from the Tenth Circuit directing the Chief Judge to reassign the case to the senior district judge. The Tenth Circuit granted the writ, but ordered the cases reassigned to the newly appointed judge who had succeeded the senior judge.

At the time *Utah-Idaho* was decided, the U.S. District Court for the District of Utah was operating under rules prescribed by the Tenth Circuit Judicial Council regarding the initial assignment of cases. Specifically, the Judicial Council's rules, much like Special Order No. 3-130 here, "required an equal and random division of civil cases and prescribed a system which balanced and apportioned the criminal, bankruptcy, immigration and naturalization cases." *Id.* at 1102. In holding invalid the chief judge's reassignment of cases, the Tenth Circuit rejected the chief judge's argument that the assignment rule did not cover the situation when an active judge takes senior status. To the contrary, the Tenth Circuit held that the chief judge's "act of choosing which cases to keep and which to assign to [the senior judge's successor] did not comply with the Council's mandate that the assignment of civil cases be equal and random, subject only to modification by written agreement of the active judges." *Id.* at 1104.

In short, the Tenth Circuit held that the initial assignment rule prohibited, by implication, the chief judge from reassigning cases already assigned to a particular judge. Special Order No. 3-130's provision for the random assignment of cases prohibits, by implication, a reassignment of those cases. It bears mention that § 137 requires that all the judges of the district agree on the "rules and orders."

A rule or order governing the reassignment of pending cases aside, Judge Buchmeyer lacked the power under § 137 to reassign *Satz* and *Torres*. Judge Buchmeyer urges that § 137 empowered him to reassign cases because Special Order No. 3-130 "does not cover the reassignment of cases — which is done by the Chief Judge alone, not by an order signed by all of the District Judges." According to this argument, § 137 empowers the chief judge to assign cases subject only to the limits imposed by formally adopted rules and orders. Assuming for the purposes of this argument that Special Order No. 3-130 is either invalid or does not prohibit the reassignment of pending cases, Judge Buchmeyer's interpretation of § 137 seems plausible: the second paragraph of the section empowers the Chief Judge to assign cases "so far as such rules and orders do not otherwise prescribe." *See Martinez v. Winner*, 771 F.2d 424, 434 (10th Cir.) (noting that the chief judge assigns the cases "when the rules and orders make no provision"), *modified*, 778 F.2d 553 (10th Cir.1985), *vacated*, 475 U.S. 1138, 106 S.Ct. 1787, 90 L.Ed.2d 333 (1986).

This interpretation of § 137 creates two problems. First, not one case upholds reassignment of a pending case by a chief judge without the consent of the presiding judge. To the contrary, courts have been wary of endorsing a general reassignment power. For example, in *McCuin v. Texas Power & Light Co.*, 714 F.2d 1255, 1261 (5th Cir.1983), we held that the Chief Judge of the Eastern District of Texas lacked the power under § 137 to reassign a case in which he had recused himself, even though no local rule prohibited such a reassignment. We noted that the appearance of impropriety counseled against allowing the recused judge, even the chief judge with the § 137 power to assign cases, to reassign the case.

Second and more to the point, the argument proves too much. Under the reading Judge Buchmeyer proposes, nothing prevents a chief judge from reassigning cases to himself where he disagrees with the substance of a ruling made by the presiding judge. But that power is antithetical to and incompatible with the structure of the federal judicial system.[11] "No express or implied power is granted a chief judge to affect administratively, directly or indirectly, litigation assigned to and pending before another judge of the court." United States v. Heath, 103 F.Supp. 1, 2 (D.Haw.1952); *see also In re Brown*, 346 F.2d 903, 910 (5th Cir.1965) ("[O]rderly procedure, of course, forbade Judge Cox to interfere with the handling of a case assigned to Judge Mize."). Although Chief Judge Buchmeyer disclaims the authority to reassign cases because of a disagreement with "how a case was handled," his interpretation of § 137 has no such limitation.

The reassignment of *Satz* and *Torres* differs significantly from a chief judge's acknowledged power to reassign cases in situations involving the recusal, death, disability, or new appointment of a judge. In those cases, the reassignment is purely administrative, involving no review of the merits of the presiding judge's orders. *See Hvass v. Graven*, 257 F.2d 1, 5 (8th Cir.) (noting that the chief judge, who reassigned a case originally adjudicated by a judge whose temporary designation to that district had lapsed, "did not revoke his old order nor withdraw the case from Judge Mickelson and assign it to Judge Hicklin. He merely in due course as an administrative act

---

[11] "[T]he structure of the federal courts does not allow one judge of a district court to rule directly on the legality of another district judge's judicial acts or to deny another district judge his or her lawful jurisdiction." *Dhalluin v. McKibben*, 682 F.Supp. 1096 (D.Nev.1988).

routinely assigned the case on his docket and assigned it to the only judge, aside from himself, who then had power to exercise the jurisdiction of the court."), *cert. denied*, 358 U.S. 835, 79 S.Ct. 58, 3 L.Ed.2d 72 (1958). In this case, Chief Judge Buchmeyer's own opinion forthrightly discloses that his actions were prompted entirely by his disagreement with Judge McBryde's conduct of the two cases.

In short, § 137 provides the chief judge of a district with broad authority to assign cases; however, that authority is circumscribed by powerful limits. This particular limit lies at the core of both the statutory structure of the federal courts and Article III's command of judicial interpretation. Implicit within that grant of power is the limitation that the chief judge cannot sit as a quasi-appellate court and review the decisions of other judges in the district via his § 137 assignment power.

V

The precise limits of a judicial council's authority under § 332(d)(1) are uncertain. The Court in *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 85 n. 6, 90 S.Ct. 1648, 1654 n. 6, 26 L.Ed.2d 100 (1970), observed that "[s]tanding alone, § 332 is not a model of clarity in terms of the scope of the judicial councils' powers." Deciding this case does not require an exact definition of the boundaries of the Council's power under § 332(d)(1). Whatever its power, the Judicial Council exceeded it here.

We investigate three questions to reach our conclusion: first, whether the Judicial Council has the authority to remedy judicial misconduct pursuant to § 332; second, if so, whether that power includes the authority to censure a judge for judicial

misconduct; and third, whether the Judicial Council here censured judicial misconduct.

A

[5] Congress created the judicial councils in 1939. *See* Pub.L. No. 76-299, § 306, 53 Stat. 1223 (1939). Originally codified at 28 U.S.C. § 448, that legislation provided in pertinent part:

> To the end that the work of the district courts shall be effectively and expeditiously transacted, it shall be the duty of the senior circuit judge of each circuit to call at such time and place as he shall designate, but at least twice in each year, a council composed of the circuit judges for such circuit, who are hereby designated a council for that purpose, at which council the senior circuit judge shall preside . . . . It shall be the duty of the district judges promptly to carry out the directions of the council as to the administration of the business of their respective courts.

In 1948, Congress recodified this provision at 28 U.S.C. § 332 and revised its language. The new § 332 provided in pertinent part that "[e]ach judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit." This language remained unaltered for over 30 years.

In *Chandler*, the Supreme Court confronted a challenge to a judicial council's power under § 332. The Judicial Council of the Tenth Circuit initially issued an order reassigning pending cases before Judge Chandler to other judges and prohibiting the assignment of cases to Judge Chandler in the future. The basis for the Judicial Council's order was Judge Chandler's inability to "discharge efficiently the duties of his office." The Judicial

Council subsequently authorized Judge Chandler to retain cases pending before him but continued to prohibit the assignment of new cases to the judge. Judge Chandler sought a mandamus from the Supreme Court to the Judicial Council.

The Court denied the writ. It declined to exercise its jurisdiction to issue the writ where other avenues of relief were open. Judge Chandler's refusal to seek an order providing for the assignment of new cases, either via unanimous agreement with his fellow district judges or via judicial council order, persuaded the Court that Judge Chandler "has not made a case for the extraordinary relief of mandamus or prohibition." 398 U.S. at 89, 90 S.Ct. at 1657.

Concurring in the denial of the writ, Justice Harlan disagreed with the Court's jurisdictional analysis. He concluded that judicial councils possess the authority under § 332 to prohibit the assignment of cases to a judge whose conduct threatens public confidence in the judiciary. Justice Harlan noted the unquestioned authority of the judicial councils to "channel" cases to other judges when necessary. *Id.* at 121, 90 S.Ct. at 1673. Responding to Judge Chandler's argument that the Judicial Council lacked the power to reassign cases so as to "punish Judge Chandler for misbehavior," Justice Harlan wrote that there was no indication that the Council entered its order out of personal animosity. *Id.* at 122, 90 S.Ct. at 1673. Justice Harlan also disagreed with Judge Chandler that only a backlog of cases justified the Council's assignment order:

> It is true, as the legislative history . . . confirms, that abatement of delays in disposition of cases was a principal purpose for creation of the Councils; but the Councils were deliberately given broad responsibilities to meet other problems as they arose. Chief Justice Groner contemplated that the

> Councils would cope not only with delays but also with "any other matter which is the subject of criticism, or properly could be made the subject of criticism, for which [a district judge] may be responsible."

Id. at 123, 90 S.Ct. at 1673. Pointing out that Judge Chandler had been a party defendant in both civil and criminal litigation and that he had been ordered to recuse himself in one case, Justice Harlan concluded that all of the circumstances, "taken as a whole, established a prima facie basis for the Council's conclusion that some action was appropriate to alleviate what the Council members perceived as a threat to public confidence in the administration of justice." *Id.* at 125, 90 S.Ct. at 1674.

The significance of Justice Harlan's discussion of the merits lies in his conclusion that § 332 authorizes judicial councils to respond to judicial conduct that threatens public confidence in the judiciary. It is true that Justice Harlan wrote only for himself and that Justices Black and Douglas vigorously disagreed with Justice Harlan on this point. *See id.* at 142, 90 S.Ct. at 1683 (Black, J., dissenting). Nonetheless, Justice Harlan's concurrence demonstrates that, at bare minimum, it is not unreasonable to view § 332 as empowering a council to remedy judicial misconduct.

B

[6] Few decisions treat the boundaries of a judicial council's power to remedy judicial misconduct pursuant to § 332. Cases affirming a judicial council's exercise of its power under § 332 typically involve judicial council rules promulgated to alleviate judicial delay or prevent "chaos."[12] In 1978, the Ninth Circuit

---

[12]*See White Motor Corp. v. Citibank, N.A.*, 704 F.2d 254, 262 (6th

Judicial Council invoked its power under § 332(d)(1) and adopted the Procedures for Processing Complaints of Judicial Misconduct. *See In re Charge of Judicial Misconduct*, 593 F.2d 879 (9th Cir.1979). The Ninth Circuit observed that these rules were "designed to provide an administrative remedy for misconduct of a judge for which no judicial remedy was available." *In re Charge of Judicial Misconduct*, 595 F.2d 517, 517 (9th Cir.1979). Significantly, however, the Judicial Council points to no case censuring a judge pursuant to § 332.

Prior to 1980, the question whether a judicial council had the power under § 332 to censure a judge for judicial misconduct was open to debate. In 1980, however, Congress enacted the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub.L. No. 96-458, 94 Stat.2035 (1980). That legislation amended § 332(d)(1) to read as it does presently. More importantly, that act added § 372(c), which creates a detailed process for the investigation and discipline of a judge whose conduct is "prejudicial to the effective and expeditious administration of the business of the courts." Section 372(c)(6)(B) enumerates the sanctions that a judicial council may impose in such circumstances and includes public and private censures or reprimands.

Cir.1983) (upholding a judicial council's promulgation pursuant to § 332 of interim bankruptcy rules "as emergency measures to prevent the collapse of the bankruptcy system" in wake of *Northern Pipeline*); *Hilbert v. Dooling*, 476 F.2d 355, 359-60 (2d Cir.) (en banc) (upholding a judicial council's promulgation pursuant to § 332 of Prompt Disposition Rules regarding pre-trial delay in criminal cases), *cert. denied*, 414 U.S. 878, 94 S.Ct. 56, 38 L.Ed.2d 123 (1973); *see also In re Jury Plan of the Eastern District of New York*, 61 F.3d 119, 121-22 (2d Cir. Jud.C. 1995) (reviewing a proposed jury plan under § 332).

Judge McBryde and the Judicial Council disagree about the effect of Congress' creation of § 372(c) in 1980. According to Judge McBryde, Congress intended § 372(c) to be the sole mechanism by which judicial councils could censure judges. The Judicial Council responds that, prior to 1980, § 332 empowered it to censure as a way of remedying judicial misconduct and that Congress did not intend by enacting § 372(c) to narrow the scope of its power under § 332.

There is some support for the Judicial Council's interpretation. Well after the passage of the 1980 legislation, *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 435 & n. 2, 105 S.Ct. 2757, 2763 & n. 2, 86 L.Ed.2d 340 (1985), explained that an attorney whose reputation had been egregiously injured by a district judge's decision to disqualify him "might be able to obtain relief from the Circuit Judicial Council pursuant to 28 U.S.C. § 332(d)(1)." The Court added that the judicial councils "exist 'to provide an administrative remedy for misconduct of a judge for which no judicial remedy is available.'" *Id.*

Ultimately, however, we conclude that whatever power the Judicial Council possesses under § 332 to remedy judicial misconduct, that power does not include the authority to censure or reprimand a judge for that misconduct. Stated bluntly, Congress has distinguished between remedying judicial misconduct and censuring a judge for that misconduct. By the same token, it has distinguished between transferring cases for administrative reasons and vacating judicial findings. While § 332 grants the judicial councils some authority to deal with judicial misconduct, the Judicial Council's authority to impose discipline based on its finding of misconduct is limited to that power conferred by § 372(c).

The history of the 1980 legislation confirms this reading of the statutory structure. The House Report describes the various types of actions § 332(d) authorizes the Judicial Council to take. These largely administrative functions include:

> assigning judges to congested districts, and to particular kinds of cases; developing rules for assigning judges within congested divisions having more than one federal court facility to the end that cases be tried, so far as practical, in the division in which such cases originate; directing them to assist infirm judges; ordering them to decide cases long held under advisement, requiring a judge to forego his summer vacation in order to clear his congested docket, compelling multi-judge courts to arrange staggered vacations, and setting standards of judicial ethics.

H.R.Rep. No. 1313, 96th Cong., 2d Sess. 9 (1980). The House Report referred to the proposed amendment to § 372 as containing "the core of the proposed judicial misconduct and disability legislation." *Id.* The Report added that "it was appropriate to place the increased disciplinary functions of the councils in [§ 372]." *Id.*

In short, both the legislative history and the structure of the statute suggest that the Judicial Council's power under § 332 does not include the authority to censure judges for misconduct. Indeed, § 372(c) is redundant surplusage under the Judicial Council's interpretation of § 332. On that view, a judicial council bent on censuring a judge need not call on the cumbersome procedures of § 372(c); it may invoke its power under § 332.

Koller's statement that § 332 exists to remedy a docket problem even though it springs from judicial misconduct does

not suggest the broader authority to censure a judge for that misconduct. The Court cited two Ninth Circuit decisions involving pre-1980 misconduct proceedings to support the proposition that § 332 empowers the judicial councils to remedy difficulties created by judicial misconduct. Those decisions, both of which dismissed the charge of judicial misconduct, did not suggest that a council has the authority under § 332 to censure a judge for misconduct. Indeed, since 1980, the Ninth Circuit appears to use § 372(c) rather than § 332 as the framework for investigating charges of judicial misconduct and assessing appropriate sanctions. See In re Charge of Judicial Misconduct, 685 F.2d 1226, 1227 (9th Cir. Jud.C. 1982) (dismissing a § 372(c) complaint); In re Charge of Judicial Misconduct, Nos. 93-80015 & 93-80288 (9th Cir. Jud.C. 1994) (attached to Judicial Council's brief). We conclude that the Judicial Council lacks the power under § 332(d) to censure a judge for judicial misconduct.

C

[7] We have no doubt that by any objective measure the Judicial Council's reassignment of *Satz* and *Torres*, accompanied by the vacating of Judge McBryde's findings and the entry of starkly contrary findings, was a strong censure of Judge McBryde for his conduct in those cases. The Council's decision regarding his "conduct" required a judgment as to whether his understanding of the facts should prevail. The Judicial Council lacks the power to censure a judge under § 332, nor may it order a case reassigned based on its disagreement with the district judge's factual findings. *See United States v. Washington*, 98 F.3d 1159, 1165 n. 1 (9th Cir.1996) (Kozinski, J., concurring) ("[O]ur judicial council has stated repeatedly that it may not address any matter that concerns the merits of a case and might

be raised through normal channels of appellate review."), *petition for cert. filed*, 65 U.S.L.W. 3713 (U.S. Apr. 7, 1997) (No. 96-1607).

The power to reassign pending cases is an extraordinary one. Courts of appeals may reassign a case pursuant to 28 U.S.C. § 2106 as part of a remand order, though that remedy is rarely invoked. *See, e.g., United States v. Microsoft Corp.*, 56 F.3d 1448, 1463 (D.C.Cir.1995) (per curiam). In contrast, 28 U.S.C. § 372(c)(6)(B)(iv) does not expressly empower a judicial council to reassign *pending* cases; rather, it only authorizes a judicial council, upon a finding of judicial misconduct pursuant to that section, to order "on a temporary basis for a time certain, no *further* cases be assigned" to the disciplined judge (emphasis added).

[8] We have found no case — and the Judicial Council has not pointed us to one — upholding the power of a judicial council to reassign pending cases as a reprimand for judicial misconduct. In *Chandler*, the Judicial Council initially ordered the reassignment of pending cases but later modified its order to permit Judge Chandler to continue hearing cases already before him. Indeed, such a power would pose constitutional questions regarding the exclusivity of congressional power to remove a sitting federal judge. *See In re Matter of Certain Complaints Under Investigation*, 783 F.2d 1488, 1510 (11th Cir.) (reserving the question of the constitutionality of a judicial council's power to forbid further assignment of cases to a judge on a temporary basis for a time certain), *cert. denied*, 477 U.S. 904, 106 S.Ct. 3273, 91 L.Ed.2d 563 (1986).

Concluding that a judicial council may not censure a judge by reassigning pending cases pursuant to § 332(d) does not mean that the Judicial Council lacks the authority under § 332 to

reassign cases for administrative reasons. In *Jimenez v. Aristeguieta*, 311 F.2d 547 (5th Cir.1962), *cert. denied*, 373 U.S. 914, 83 S.Ct. 1302, 10 L.Ed.2d 415 (1963), we upheld the authority of the Judicial Council to reassign a pending extradition proceeding to another judge. In that case, Venezuela sought the extradition of its former president, Marcos Gamines. Judge Mathes of the U.S. District Court for the Southern District of California, who was sitting by designation in Miami, issued an arrest warrant for Gamines. Judge Mathes' assignment to the Southern District of Florida evidently lapsed during the extradition proceedings, and the Judicial Council for the Fifth Circuit ordered the reassignment "to some other judge" of any "unfinished business" of Judge Mathes. Chief Judge Whitehurst subsequently ordered the reassignment of Gamines' case to himself. Chief Judge Whitehurst ordered Gamines confined pending extradition by the Secretary of State. Gamines sought a writ of habeas corpus and argued, *inter alia*, that the reassignment was invalid because Chief Judge Whitehurst did not have jurisdiction to enter the order of commitment.

We disagreed. Citing the Judicial Council's power under § 332, we concluded that "[t]his extradition proceeding was 'the business of the courts' and Judge Whitehurst's assignment to hear the evidence of criminality under the order of the Judicial Council of the Fifth Circuit and Chief Judge Whitehurst's order was a proper exercise of their authority." *Id.* at 554. Significantly, however, we noted that "[t]he reassignment did not constitute any attempt to review any action of Judge Mathes as extradition magistrate." *Id.*

Had the Council proceeded under § 372(c)(3), it would have been confronted by the reality that the complaint of judicial

misconduct was "directly related to the merits of a decision or procedural ruling." In *In re Charge of Judicial Misconduct*, 685 F.2d 1226, 1227 (9th Cir. Jud.C. 1982), a judicial council dismissed a complaint filed under § 372(c) because the statute required the dismissal of "complaints of judicial misconduct which in substance are simply objections to substantive or procedural error." The Council observed that "[e]ven if there were multiple legal errors in the handling of this case, . . . such matters were entirely cognizable in the ordinary course of appellate review." *Id.*[13] *See also In re Charge of Judicial Misconduct*, 613 F.2d 768, 769-70 (9th Cir.1980) (dismissing complaint).

This limit, which is expressed within § 372(c), is implicit with § 332(d)(1). Stated another way, it would make no sense for Congress to prohibit a judicial council from reviewing the merits of an individual judge's conduct pursuant to § 372(c) but permit that same review pursuant to § 332(d). Indeed, even when the Ninth Circuit was operating under its Procedures for Processing Complaints of Judicial Misconduct, which were promulgated pursuant to § 332(d), it did not understand those procedures as empowering a judicial council "to pass upon allegations relative to a judge's disposition of a particular piece of litigation, absent any suggestion of corruption or other impropriety or any indication of a broader pattern of conduct evidencing incapacity, arbitrariness, or neglect of office." *In re Charge of Judicial Misconduct*, 593 F.2d at 881.

---

[13]The Council did, however, hold out the possibility of an "exceptional case developing where the nature and extent of the legal errors are so egregious that an inference of judicial misconduct might arise, but that would be a rare case, and it has not occurred here." 685 F.2d at 1227.

The argument that the 1980 amendments to § 372 effectively eliminated the power of judicial councils to address judicial misconduct under § 332 is powerful. Remedying judicial misconduct will ordinarily amount to a censure. We need not decide, however, at what point findings of misconduct supporting a remedy of transferring cases become a censure of the judge beyond the authority granted by § 332. At the least, that authority does not extend to findings of misconduct that require the invalidation of factual findings made by an Article III judge in a case pending before him and over which he has jurisdiction.

We do not suggest that the Judicial Council set out to review the merits of Judge McBryde's decision. There is no question but that the Council responded to what it perceived to be improper and abusive acts by a trial judge. Significantly, the line between the merits of a decision and the judge's conduct in reaching the decision is not always easily found. *Compare In re Charge of Judicial Misconduct*, No. 93-80015 (9th Cir. Jud. C. 1994) (sanctioning a judge for making intemperate and abusive remarks from the bench) *with Petition of Lauer*, 788 F.2d 135 (8th Cir. Jud.C. 1985). In the latter case, the Eighth Circuit Judicial Council dismissed a charge of judicial misconduct brought under § 372(c). The complaint charged that a district judge made inappropriate remarks during the sentencing of several defendants. In comments equally applicable to this case, Chief Judge Lay observed:

> The Judicial Conduct and Disability Act should not be invoked so as to chill the independence of a trial judge in a judicial proceeding. A trial judge should not fear that because of comments he or she makes from the bench, which in good faith the judge feels are related to the proceeding before the court, he or she ultimately may be subject to a

> disciplinary sanction by the Judicial Council. Disenchanted litigants or other citizens should not be able to attempt to influence a federal judge about a judicial decision through the threat of disciplinary sanction. This is clearly not what Congress intended in passing the Act.

Id. at 138.

VI

We conclude that Chief Judge Buchmeyer's and the Judicial Council's orders were not limited to providing a remedy for misconduct because they rested on the invalidation of judicial findings in a pending case and constituted a censure of the judge. We grant the petition for a writ of mandamus on this ground and vacate the reassignment orders. The cases will be returned to Judge McBryde's docket. Whether, in light of the events here described and the misunderstandings of which they are a part, he wishes to retain the cases or recuse is left in the first instance to his judgment as an Article III judge. We do not reach the additional claim that the Judicial Council violated Judge McBryde's Fifth Amendment right to due process.

The petition for mandamus is GRANTED.

EMILIO M. GARZA, Circuit Judge, specially concurring:

I concur in Judge Higginbotham's excellent opinion, but would not reach the issues in Part III.A.

DENNIS, Circuit Judge, specially concurring:

I respectfully concur in the essential elements and result of the majority opinion.

Because we do not have appellate jurisdiction to review an order of the Judicial Council, as the majority observes, the

question of whether we can issue a writ to the Judicial Council in aid of such non-existent jurisdiction seems to answer itself. However, because it is not necessary to consider the question in the present case, I do not join in Part III A of the majority opinion devoted to an inconclusive and, I believe, unprofitable discussion of the subject.

Due to the fact that Chief Judge Buchmeyer's orders clearly lie within our appellate jurisdiction, we may issue writs to the district court in aid of that jurisdiction, unless the Judicial Council's order constitutes a valid administrative or disciplinary order that subsumed and removed the subject matter of Chief Judge Buchmeyer's orders from our appellate jurisdiction. For essentially the same reasons assigned by the majority, I conclude that the Judicial Council's order was not a product of actions confined to matters within its delegated administrative or disciplinary authority but extended to matters that bear directly on the decision of individual cases. Consequently, the Judicial Council order was ineffective as a valid administrative or disciplinary order and was not capable of removing Chief Judge Buchmeyer's orders from our appellate jurisdiction.

As the majority opinion makes clear in Part III B and succeeding parts, Chief Judge Buchmeyer exceeded the lawful exercise of his prescribed jurisdiction in taking the cases from Judge McBryde and reassigning them to himself. Accordingly, I join in the majority's decree insofar as it grants a writ of mandamus to the district court, vacates that court's reassignment orders, and returns the cases to Judge McBryde's docket.

Order of the Judicial Council of the Fifth Circuit

THE JUDICIAL COUNCIL
FIFTH JUDICIAL CIRCUIT

In Re: Request by District Judge John H. McBryde for case reassignment

Before: POLITZ, Chief Judge, and Judges BARBOUR, BENAVIDES, BLACK, COBB, DAVIS, GARWOOD, JOLLY, JONES, KING, PARKER, POLOZOLA, PRADO, SANDERS, SEAR, SENTER, SMITH, STEWART, and WALTER[14]

ORDER

Judge John H. McBryde of the Northern District of Texas requests that this council grant relief from orders of Chief Judge Jerry Buchmeyer reassigning two cases to Chief Judge Buchmeyer that originally were allotted to Judge McBryde. The two cases are **United States v. Michael Eric Satz,** No. 4:94-CR-094-A, N.D. Tex. **(Satz)** and **Sanjuano Torres v. Trinity Industries, Inc.**, No. CA 4:90-812-A, N.D. Tex. **(Torres)**. The Council unanimously denies the request.

Our review of the record along with our independent investigation in these two cases overwhelmingly demonstrates that Judge Buchmeyer's factual predicate, on which he based his orders, was correct. Judge McBryde's conduct in both cases was unwarranted.

---

[14]Judge Wiener was designated to replace Judge King and Judges Garwood and Jones were absent and did not participate.

In **Satz**, Judge McBryde's attack on AUSA Darcy A. Cerow and Postal Inspector Rex Whiteaker and his accusations against them of lying and contempt of court were baseless, threatening irreparable damage to the professional reputations and careers of both Ms. Cerow and Mr. Whiteaker. The record and our investigation confirm that the statements and conduct of AUSA Darcy Cerow and Postal Inspector Rex Whiteaker were truthful, professional, and appropriate under the circumstances. In addition, Judge McBryde's refusal to accord proper respect to the orders of another United States District Judge which sealed sensitive Rule 11 proceedings undermined a grand jury investigation.

In **Torres**, our investigation and the record confirmed that Judge McBryde's conduct against Nancy Doherty, the clerk of the Northern District of Texas, was unwarranted, abusive, and threatened to damage Ms. Doherty's professional reputation. We are persuaded that Ms. Doherty took appropriate action upon being advised of the problems regarding the deposit of funds held for the minor and conducted the affairs of her office in a professional manner.

We need not decide whether 28 U.S.C. § 137 authorized Chief Judge Buchmeyer's action in reassigning these cases because the Judicial Council unanimously concludes that Judge McBryde's above described conduct is an impediment to the effective administration of justice. Therefore under the authority of 28 U.S.C. § 332 we reassign **Satz** and **Torres** to Chief Judge

Buchmeyer effective May 1, 1995 and April 27, 1995, respectively.

FOR THE COUNCIL:

/s/ Henry A. Politz
Henry A. Politz, Chief Judge
October 20, 1995

Orders of Chief Judge Buchmeyer

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

SANJUANA TORRES, INDIVIDUALLY AND
ON BEHALF OF THE ESTATE OF
RAIMUNDO JAVIER TORRES, DECEASED, AND
ALL LEGAL BENEFICIARIES THEREOF
(GRECIA TORRES, A MINOR)

v.

TRINITY INDUSTRIES, INC.

CA. 4:90-812-A

ORDER

This case is reassigned from Judge John McBryde to Chief Judge Jerry Buchmeyer, with this reassignment being effective immediately. See 28 U.S.C. § 137. The case number will be changed to CA 4:90-812-R

Entered: April 27, 1995

/s/ Jerry Buchmeyer
Jerry Buchmeyer, Chief Judge
Northern District of Texas

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES OF AMERICA

v.

MICHAEL ERIC SATZ, ET AL.

NO. 4:94-CR-094-A

ORDER

All further proceedings in this case concerning the defendant Michael Eric Satz are reassigned from Judge John McBryde to Chief Judge Jerry Buchmeyer, with this reassignment being effective immediately. See 28 U.S.C. § 137. The case number concerning the defendant Michael Eric Satz is changed to No. 4:94-CR-094-R. The contempt order of April 26, 1995 is vacated. This Order and all further proceedings in CR 94-094-R will be placed under seal.

Entered: May 1, 1995

/s/ Jerry Buchmeyer
Jerry Buchmeyer, Chief Judge
Northern District of Texas

Order of the Court of Appeals Denying Rehearing

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-11082

[SEAL
UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
FILED
DEC - 1 1997
CHARLES R. FULBRIDGE III, CLERK]

In re John H. McBRYDE, U.S. District Judge, Petitioner.

Petition for Writ of Mandamus to the United States District Court for the Northern District of Texas

---

On Petition for Rehearing and Suggestion for Rehearing En Banc

(Opinion July 2, 1997, 5th Cir., 1997, 117 F.3d 208)

Before HIGGINBOTHAM, EMILIO M. GARZA, and DENNIS, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court

and a majority of the judges who are in regular activity service not having voted in favor, (Fed. R. App. P. and 5th Cir. R. 35) the Suggestion for Rehearing En Banc is also DENIED.

ENTERED FOR THE COURT:

/s/ Patrick E. Higginbotham
United States Circuit Judge

Judges Carolyn D. King, E. Grady Jolly, W. Eugene Davis, John M. Duhe, Jr., Fortunato P. Benavides, Carl E. Stewart and Robert M. Parker did not participate in the consideration of the suggestion for rehearing en banc.

Supreme Court, U.S.
FILED
APR 27 1998
CLERK

No. 97-1427

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

JUDICIAL COUNCIL OF THE FIFTH JUDICIAL CIRCUIT AND JERRY BUCHMEYER, CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS,
Petitioners,

v.

JOHN H. MCBRYDE, DISTRICT JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

DAVID BROILES
KIRKLEY, SCHMIDT & COTTON, L.L.P
301 Commerce Street
Fort Worth, Texas 76102
(817) 338-4500

WILLIAM H. JEFFRESS, JR.
Counsel of Record
SCOTT L. NELSON
JODY MANIER KRIS
MILLER, CASSIDY, LARROCA & LEWIN, L.L.P.
2555 M Street, N.W.
Washington, D.C. 20037
(202) 293-6400

TABLE OF CONTENTS

INTRODUCTION 1

STATEMENT OF THE CASE 3

REASONS FOR DENYING THE WRIT 6

I. THE COURT OF APPEALS APPLIED SETTLED PRINCIPLES OF STATUTORY CONSTRUCTION TO REACH THE ONLY REASONABLE RESULT IN A CASE OF FIRST IMPRESSION 6

A. The Court of Appeals Did Not Rule upon the First Question Presented by the Petitioners 7

B. The Judgment of the Court of Appeals Is Supported by an Alternative Holding That Petitioners Have Not Challenged 8

C. The Fifth Circuit's Decision Does Not Conflict with Decisions of this or Other Courts and Does Not Present Issues of Recurring Significance 8

1. The Judgment Below Does Not Conflict with Any Case Discussing "Implied Repeals" 8

2. The Judgment Below Does Not Conflict with this Court's Decision in *Richardson-Merrell v. Koller*, 472 U.S. 424 (1985) 10

3. The Judgment Below Does Not Conflict with Any Case Construing 28 U.S.C. § 137 12

4. The Judgment Below Presents No Recurring Problems for the Administration of the Judicial System by Judicial Councils 13

II. PETITIONER'S ARGUMENT ABOUT STANDING PRESENTS NO ISSUE WORTHY OF REVIEW 16

III. OTHER REASONS MILITATE IN FAVOR OF THE DENIAL OF THIS PETITION 19

CONCLUSION 20

TABLE OF AUTHORITIES

CASES:

Chandler v. Judicial Council of the Tenth Circuit of the United States, 398 U.S. 74 (1980) 12, 13, 18

Coleman v. Miller, 307 U.S. 433 (1939) 18

In re McBryde, 120 F. 3d 519 (5th Cir. 1997) 14

Kerr-McGee Corp. v. Ritter, 461 F. 2d 1104 (10th Cir. 1972) 12

Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982) 9

Martinez v. Winner, 771 F. 2d 424 (10th Cir.), *modified on other grounds*, 778 F.2d 553 (10th Cir. 1985) *vacated on other grounds*, 475 U.S. 1138 (1986) 12

Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555 (1963) 9

Morton v. Mancari, 417 U.S. 535 (1974) 9-10

Paul v. Davis, 424 U.S. 693 (1976) 16

Raines v. Byrd, 117 S.Ct. 2312 (1997) 18

Richardson-Merrell Inc. v. Koller, 472 U.S. 424 (1985) 10, 11

Rodriguez v. United States,
480 U.S. 552 (1987) 9

Utah-Idaho Sugar Co. v. Ritter,
461 F.2d 1100 (10th Cir. 1972) 12

Walker v. Mesquite, TX,
129 F.3d 831 (5th Cir. 1997) 17

STATUTES AND RULES:

28 U.S.C.
§ 137 ..... 5, 6, 12, 13
§ 332 ..... passim
§ 332(d) ..... passim
§ 332(d)(1) 11
§ 372(c) ..... passim
§ 372(c)(3) (A) 1
§ 372(c)(6)(B)(iv) 1
§ 372(c)(6)(B)(v) 1
§ 372(c)(6)(B)(vi) 1
§ 372(c)(10) 16
§ 372 (c)(11) (A) 1
§ 372(c)(11) (B) 1

42 U.S.C.
§ 1981 12
§ 1985 12
§ 1986 12
§ 1988 12

JUDICIAL CONFERENCE OPINIONS

In re Complaint of Judicial Misconduct,
No. 88-372-01 1

Phelps v. Kelly,
No. 87-372-01 1

OTHER AUTHORITIES

D.C. Circuit Rules Governing Complaints of
Judicial Misconduct
Rule 2 14
Rule 20 15

H.R. Rep. 96-1313, 96th Cong.,
2d Sess. (1980) 15

INTRODUCTION

The Judicial Councils Reform and Judicial Conduct and Disability Act, Pub. L. No. 96-458, 94 Stat. 2035 (1980), established a mechanism for circuit judicial councils to address complaints that a federal judge is unable to discharge all the duties of office because of physical or mental disability, or has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts. *See* 28 U.S.C. § 372(c). The text of the Act authorizes judicial councils to take various actions in response to proven disability or misconduct, such as issuing private or public censures, § 372(c)(6)(B)(v) & (vi), and ordering that a judge's case assignments be suspended. § 372(c)(6)(B)(iv). Before a council takes any of these actions, however, the statute requires it to give the subject judge "adequate prior notice of any investigation . . . in writing," § 372(c)(11)(A), and an opportunity to "present oral and documentary evidence, to compel the attendance of witnesses and the production of documents, to cross-examine witnesses, and to present argument orally or in writing." § 372(c)(11)(B). Further, the Act does not permit judicial councils to review or take any action against a judge for conduct "directly related to the merits of decisions or procedural rulings. § 372(c)(3)(A).

The passage of the Act in 1980 was controversial in many respects. Serious constitutional questions concerning the Act remain unresolved. Nonetheless, since 1980, section 372(c) has been the sole source of authority on which judicial councils have relied to evaluate allegations of judicial misconduct, and, in a very few instances, to censure a judge for those allegations. *See, e.g.*, *Phelps v. Kelly*, No. 87-372-01 (Jud. Conf.) (imposing public reprimand); *In re Complaint of Judicial Misconduct*, No. 88-372-01 (Jud. Conf.) (imposing private reprimand) (both orders on file at the Federal Judicial Center).

The Judicial Council of the Fifth Circuit departed from the norm when it censured Respondent John H. McBryde, United States District Judge for the Northern District of Texas, in a public order issued on October 20, 1995. The order not only reprimanded Judge McBryde, but also ordered the reassignment of two cases on his docket, without affording him any of the procedural protections set forth in § 372(c). The Council instead relied on 28 U.S.C. § 332 as the basis for its action. Judge McBryde petitioned for mandamus to challenge the order and case reassignments, arguing that a judicial council has no authority—under § 332 or otherwise—to punish a judge because it disagrees with his judicial rulings. A unanimous panel of the Fifth Circuit concluded that § 332 gives judicial councils no power to censure a judge. It also held that the Council's action evidenced a disagreement with Judge McBryde's legal and factual rulings, and that the Council had no authority under *any* statute to remove cases or take other actions against a judge based on such disagreement. The panel resolved these questions of first impression by applying uncontroversial methods of statutory construction in light of settled principles of constitutional law.

Petitioners take the extraordinary position in their petition for certiorari that the Fifth Circuit's decision was wrong, because judicial councils must have authority to evade the procedural requirements of § 372(c) where convenient in order to combat a supposedly growing problem of judicial misconduct. Just as remarkably, Petitioners contend that a judge who is censured by a judicial council does not sustain an injury-in-fact sufficient to create an Article III case or controversy. Petitioners utterly fail to identify any legitimate conflict with the jurisprudence of this Court or with other circuits that might warrant certiorari review. Nor have they presented a convincing case that this issue will recur, or that the Fifth Circuit's opinion imposes any hardship on judicial

councils in the administration of justice for which correction by this Court is otherwise necessary.

STATEMENT OF THE CASE

The background of events precipitating the filing of Judge McBryde's petition for writ of mandamus is thoroughly set forth in the opinion of the Fifth Circuit. We briefly highlight here the most salient facts.

In April, 1995, Judge McBryde was the presiding judge in a criminal case, *United States v. Satz*, No. 4:94-CR-094-R (N.D. Tex.). In connection with the sentencing of the defendant in that case, he held hearings in which he found that an Assistant United States Attorney unjustifiably refused to answer his questions and to supply him with information relevant to the sentencing of the defendant, and misrepresented the nature and scope of an order that supposedly sealed this information. On the basis of these factual findings, he concluded that the Assistant United States Attorney was in contempt of court, although he imposed no sanction.

About the same time, he discovered that the Clerk of the Court had made an error in complying with his order of settlement in a civil case, *Torres v. Trinity Industries, Inc.*, CA 4:90-812-A (N.D. Tex.), by failing to deposit settlement proceeds in an interest bearing account. After he entered an order directing the Clerk to supply him with information explaining the error, the Clerk responded, with the drafting assistance of Chief Judge Buchmeyer, in a highly personal letter that criticized Judge McBryde for entering his order. The letter also stated that the Clerk had taken action to correct the situation in a way that Judge McBryde had expressly disapproved in an earlier order. Judge McBryde issued another order, stating that the Clerk's response had been "so unprofessional and disrespectful of the undersigned judge and

court, and manifested such a high level of insolence, that it borders on, if it does not constitute, contempt of court by one of its statutory officers." The order directed the Clerk to supply further information regarding the misplacement of funds and the amount of loss to the minor plaintiff, but did not impose any sanctions on the Clerk..

In each case, persons aggrieved by Judge McBryde's findings contacted Northern District of Texas Chief Judge Buchmeyer *ex parte*. Judge Buchmeyer, without the benefit of the record on which Judge McBryde had acted, expressed disagreement with the findings underlying Judge McBryde's orders. After discussing his proposed actions with Fifth Circuit Chief Judge Politz, but without notice to Judge McBryde or the other parties to the litigation, Judge Buchmeyer reassigned the cases to himself and vacated Judge McBryde's findings and orders.

Judge McBryde then requested the assistance of the Judicial Council to determine Chief Judge Buchmeyer's authority to effect these reassignments. Chief Judge Politz ordered a Special Committee to study the issues presented in Judge McBryde's request. He informed Judge McBryde that the Committee would take testimony from him and Chief Judge Buchmeyer on these issues. On October 19, 1995, Judge McBryde testified before the Committee. Chief Judge Buchmeyer also testified that day, but Judge McBryde's request to attend that portion of the proceeding was denied. The Committee did not inform Judge McBryde of the identity of any other witnesses who testified against him. Judge McBryde later learned that the Committee took additional testimony out of his presence from the Assistant United States Attorney criticized in the *Satz* case and from the Clerk of the Court criticized in *Torres*. Judge McBryde was not given the opportunity to confront or cross-examine this testimony. Without informing Judge McBryde, the Committee reported its findings to the full Council the next

day. Judge McBryde was not provided, before or after the fact, a written or transcribed copy of that report.

The Council issued and published an order on October 20, 1995, which can only be described as a scathing public reprimand. It declared that Judge McBryde's finding that the Assistant United States Attorney had lied and his subsequent ruling that she was in contempt were "baseless." It stated that its independent "investigation" confirmed that the Assistant United States Attorney's testimony in the *Satz* case had been "truthful, professional and appropriate." It also found that the order directed to the Clerk in *Torres* was "unwarranted." On these bases, it concluded that Judge McBryde's conduct constituted an impediment to the effective administration of justice. It ordered the reassignment of *Satz* and *Torres* pursuant to its own claimed power under 28 U.S.C. § 332(d). It did not rule on whether Chief Judge Buchmeyer had authority under 28 U.S.C. § 137 to reassign the cases.

Judge McBryde challenged the case reassignments by way of a petition for writ of mandamus in the Fifth Circuit. He argued that the Council had no authority to reassign the cases based on disagreement with his findings and rulings. He contended that such reassignments violate Article III of the Constitution because they infringe upon the federal courts' exclusive constitutional authority to decide cases, and they threaten judicial independence. He also argued that the reassignments and reprimand were beyond the power of the Judicial Council, because the Council had not afforded him any of the procedural protections set forth in 28 U.S.C. § 372(c) or inherent in the Due Process Clause.

In a meticulous, fifty-seven page opinion, a unanimous panel of the Court of Appeals found that the disagreement between Judge McBryde and the Council arose out of a "struggle between conflicting interpretations of the facts" in the *Satz* and *Torres* cases. Pet. App. 22a. The Court

expressly found that Judge McBryde had made "reasonable" findings of fact. *Id.* After establishing its own jurisdiction to hear this case (which petitioners do not challenge, except as regards standing), it then held that Chief Judge Buchmeyer did not possess any authority to reassign cases based on disagreement with rulings issued therein, either under the Northern District's local rules and orders for assignment of cases or under § 137. Pet. App. 41a. It further held, on two separate grounds, that the Judicial Council had no authority to reassign the cases. First, it held that the Council possesses no authority to censure a judge pursuant to 28 U.S.C. § 332(d). *Id.* at 46a. Second, it held that the Council may not, in any event, reassign cases because it disagrees with the merits of judicial rulings and factual findings issued by the presiding judge in those cases. *Id.* at 48a.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS APPLIED SETTLED PRINCIPLES OF STATUTORY CONSTRUCTION TO REACH THE ONLY REASONABLE RESULT IN A CASE OF FIRST IMPRESSION

In the first question presented, Petitioners mischaracterize the holding of the Fifth Circuit in an attempt to portray a conflict with this Court's jurisprudence and to conjure a potential crisis for judicial councils attempting to administer the judicial system. Before discussing whether the alleged conflicts and crisis are legitimate, it is necessary to understand clearly the alternative nature of the Fifth Circuit's dual holdings. *First*, expressly noting that it was not passing on the Council's power to "remedy" judicial misconduct under 28 U.S.C. § 332, Pet. App. 46a, the court held that a judicial council "lacks the power to censure a judge under § 332" and found that the Council's actions in this case constituted a censure. Pet. App. 48a. *Second*, it held that a judicial council has no power, under either § 332(d) or § 372(c), to "order a case reassigned based on its

disagreement with the district judge's factual findings." Pet. App. 48a.

A. The Court of Appeals Did Not Rule upon the First Question Presented by the Petitioners

The first question presented in the petition for certiorari is whether judicial councils may ever "rectify" the adverse effects of judicial misconduct by issuing an order under § 332. The Fifth Circuit explicitly declined to answer this question. Pet. App. 46a ("whatever power the Judicial Council possesses under § 332 to remedy judicial misconduct, that power does not include the authority to censure or reprimand a judge for that misconduct"); *id.* at 44a ("it is not unreasonable to view § 332 as empowering a council to remedy judicial misconduct"). Thus, the first question on which the Petitioners urge this Court to grant certiorari is not presented by the case.

To the extent that the arguments presented in the Petition can be construed more broadly to challenge the holding that a judicial council may not *censure* a judge for misconduct pursuant to § 332,[1] there are several reasons why that question does not present an issue worthy of this Court's review.

---

[1] The petition nowhere explicitly contests the finding of the Fifth Circuit that "by any objective measure the Judicial Council's reassignment of *Satz* and *Torres*, accompanied by the vacating of Judge McBryde's findings and the entry of starkly contrary findings, was a strong censure of Judge McBryde for his conduct in those cases." Pet. App. 48a. Even if Petitioners had challenged that finding in their Petition, such a challenge would not be a proper basis on which to exercise certiorari jurisdiction, because it involves a fact-bound issue of no general importance.

B. The Judgment of the Court of Appeals Is Supported by an Alternative Holding That Petitioners Have Not Challenged

Petitioners do not challenge the central findings of the Court of Appeals: the Judicial Council's reassignment was based, in the *Torres* case, on a disagreement with Judge McBryde's determination that his orders had not been followed, and, in the *Satz* case, on a belief that Judge McBryde incorrectly found that an Assistant United States Attorney was untruthful during hearings held before him. Even assuming that the Fifth Circuit wrongly held that a judicial council may not censure a judge under § 332, Petitioners have not, and cannot, identify any conflict with the alternative holding of the Court of Appeals—that a judicial council may not reassign cases under § 332 based on disagreement with the merits of judicial decisions. Thus, even if Petitioners were to prevail on the first question presented, it would not lead to a different result in this case.

C. The Fifth Circuit's Decision Does Not Conflict with Decisions of this or Other Courts and Does Not Present Issues of Recurring Significance

In any event, the arguments advanced by Petitioners fail to support their contention that the judgment below conflicts with decisions of this Court and raises problems for the administration of the judicial system. The authority they cite for each argument reveals no such conflict or problems.

1. The Judgment Below Does Not Conflict with Any Case Discussing "Implied Repeals"

Petitioners first contend that the Fifth Circuit's decision conflicts with this Court's cases disfavoring "implied repeals." But the Fifth Circuit did not hold that § 372(c) repealed § 332 by implication or otherwise. Section 332 was

amended and reenacted at the same time § 372(c) was first enacted, all as part of the same legislation. Because the two provisions in their present form had been crafted, discussed and passed by the legislature at the same time, the Fifth Circuit interpreted § 332 in conjunction with the text of § 372(c) and legislative history discussing both provisions. It explained that § 372(c) expressly permits censure for judicial misconduct, Pet. App. 45a, and that the legislative history accompanying the newly enacted language of § 332(d) focused on administrative functions, not disciplinary functions. *Id.* at 47a. It also reasoned that to permit a judicial council to exercise its disciplinary functions under § 332(d) would render superfluous all of the procedural requirements detailed in § 372(c). *Id.* It concluded that the two provisions, as enacted together, precluded a judicial council from acting as a disciplinary body under § 332. *Id.* at 48a.

This reasoning does not conflict with any Supreme Court precedent discussing the concept of an implied repeal. Implied repeals, as explained in the cases cited by Petitioners on page 16 of the Petition, exist where one statute supersedes or limits the meaning of an entirely different statute, separately enacted at an earlier time, and not mentioned at all when the second statute was enacted. Because the Fifth Circuit did not find that § 372(c) repealed a portion of § 332 by implication, it was unnecessary for it to engage in the type of analysis used in *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555 (1963); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982) or *Rodriguez v. United States*, 480 U.S. 522 (1987), to determine whether the two statutes were manifestly inconsistent or in irreconcilable conflict.

Nor does the judgment below violate the principle that "when two statutes are capable of co-existence, it is the duty of the courts . . . to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). In *Morton*, the Court held that the generally applicable anti-discrimination laws

passed in 1972 did not eliminate a longstanding specific provision establishing a preference for hiring Indians in the Bureau of Indian Affairs. Here, the Court construed a general provision (§ 332) alongside a specific one (§ 372(c)), and was careful to ensure, as did the Court in *Morton*, that both provisions were given effect. Petitioners cannot claim that the Fifth Circuit rendered § 332(d) meaningless; the Court recognized that § 332(d) has been and can be used "to alleviate judicial delay or prevent 'chaos.'" Pet. App. 44a.

In the end, it does not matter whether, as Petitioners contend, § 332(d) conferred authority to discipline judges prior to the passage of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980. Whether § 332(d) contained such authority before 1980 does not answer the question whether § 332(d) as amended in 1980 contains such authority. Petitioners cannot point to any decision of a court or a judicial council since 1980 that has relied on § 332 to discipline or censure a judge.

2. The Judgment Below Does Not Conflict with this Court's Decision in *Richardson-Merrell v. Koller*, 472 U.S. 424 (1985)

Petitioners next contend that the Fifth Circuit's decision conflicts with *Richardson-Merrell Inc. v. Koller*, 472 U.S. 424 (1985). The District Court in that case had disqualified the plaintiff's lawyers on the ground that they had engaged in misconduct. The Court of Appeals heard an immediate appeal from the order and found the disqualification to be invalid. The Supreme Court granted certiorari on the question whether orders disqualifying counsel in a civil case are collateral orders subject to immediate appeal. It held that they are not. The Court of Appeals had reasoned that an interlocutory appeal was necessary for an attorney to vindicate his reputation. This Court disagreed, and after cataloguing several other *judicial* avenues by which an

attorney might vindicate his reputation, it stated, in dicta, that an attorney injured by a disqualification decision "*might* be able to obtain relief from the Circuit Judicial Council pursuant to 28 U.S.C. § 332(d)(1)." *Id.* at 435 (emphasis added).

The comments in *Richardson-Merrell*, apart from being dicta, do not call into question the validity of the judgment below. By alluding to the fact that an injured attorney "might" be able to obtain "relief," this Court never stated that a judicial council had the power under § 332(d) to censure a judge.[2] It certainly did not take the further step to suggest that an appropriate "remedy" for the injury would be for the judicial council to reassign the case to another judge because it thought the judge had erred in his order disqualifying the attorney. Rather than conflicting with *Richardson-Merrell*, the Fifth Circuit followed its guidance. The Court in *Richardson-Merrell* admonished: "it is well established that Judicial Councils do not exist to review claims that a particular trial judge's rulings were erroneous." *Id.* at 435 n.2. The Fifth Circuit found that the Judicial Council, in ordering reassignment of the *Satz* and *Torres* cases, did review the correctness of Judge McBryde's rulings in excess of the power granted it by the statute.

---

[2] The Court may have, for instance, contemplated that a judicial council could approach a judge informally and relay information that the aggrieved lawyer felt his reputation was unjustifiably attacked in the judge's orders. If, upon reflection, the subject judge agreed, apologized to the lawyer, and modified his order to remove some of the harsh language, it might be said that the judicial council remedied the problem. It is not the same, however, to allow a judicial council to use coercive measures such as public reprimands or case reassignments premised on disagreement with the subject judge's rulings.

3. The Judgment Below Does Not Conflict with Any Case Construing 28 U.S.C. § 137

Petitioners next argue that the Fifth Circuit erred in holding that § 137 does not confer authority on a chief judge to reassign cases in the circumstances of this case. To support their argument, they cite *Martinez v. Winner*, 771 F.2d 424 (10th Cir.), *modified on other grounds*, 778 F.2d 553 (10th Cir. 1985), *vacated on other grounds*, 475 U.S. 1138 (1986). *Martinez* held that a chief judge was immune from suit under 42 U.S.C. §§ 1981, 1985, 1986, and 1988, for allegations that he violated the plaintiff's constitutional rights when he assigned the plaintiff's criminal case to himself in contravention of the local rules. The court in *Martinez* held that the assignment of the criminal case was a judicial act for which the judge was immune from suit. The Fifth Circuit's decision is not only perfectly consistent with the disposition of completely unrelated issues in *Martinez*, it expressly followed two other Tenth Circuit cases that were directly on point in reaching the conclusion that § 137 did not confer authority to depart from the Local Rule governing the assignment of cases. Pet. App. 34a (following *Utah-Idaho Sugar Co. v. Ritter*, 461 F.2d 1100 (10th Cir. 1972) and *Kerr-McGee Corp. v. Ritter*, 461 F.2d 1104 (10th Cir. 1972)).

Nor does *Chandler v. Judicial Council of the Tenth Circuit of the United States*, 398 U.S. 74 (1970), provide any support for Petitioners' contention that § 137 authorizes a chief judge to reassign a case over the objection of a subject judge when he perceives the judicial rulings in the case to be contrary to the effective administration of justice. The majority of the Court in *Chandler* refused to rule on the merits of Judge Chandler's petition (which involved reassignment because of a docket backlog, not because of disagreement with the merits of judicial decisions), holding only that Judge Chandler had failed to exhaust his administrative remedies before petitioning for mandamus. *Id.*

at 87-88. To the extent that *Chandler* spoke at all to the applicability of § 137, it implicitly recognized that the disagreement of one judge as to the division of his caseload would preclude reassignment by a chief district judge under § 137. *Id.* at 87.[3]

4. The Judgment Below Presents No Recurring Problems for the Administration of the Judicial System by Judicial Councils

Petitioners' last contention is that the Fifth Circuit's decision deprives its judicial council of necessary authority to ensure the effective administration of justice. In this case, the Fifth Circuit made factual findings about Judge McBryde's conduct in *Satz* and *Torres* that are inconsistent with the conclusion that he impeded the effective administration of justice. More generally, Petitioners' contention is premised on a misrepresentation regarding the limits of § 372(c) and conflicts with the Council's own actions. Moreover, it inaccurately characterizes the practice of all other judicial councils, which have, since 1980, relied on § 372(c) as the exclusive method to discipline judges on contested allegations of misconduct.

First, Petitioners mischaracterize § 372(c) when they state that the Fifth Circuit's decision "insulate[s] from redress 'misconduct' that does not generate a formal Section 372(c) complaint." Section 372(c)(1) explicitly authorizes a chief judge to "identify" as a complaint allegations that are brought to his attention through informal channels, and to treat those allegations in the same manner as a complaint filed by a third party. The Chief Judge must, however, state his reasons for

---

[3] It has not been suggested, and the Fifth Circuit never considered, whether § 137 would authorize the Judicial Council to reassign the cases. On the facts of this case, the Judicial Council obviously would have no such power.

identifying the complaint in writing, so that the subject judge is adequately informed of the charges. The Fifth Circuit's decision thus by no means "insulates" misconduct that comes to the attention of a Chief Judge without the filing of a citizen complaint.

Second, Petitioners' argument that the Fifth Circuit's opinion deprives the Council of the ability to redress the sort of conduct alleged in this case contradicts the actual behavior of the Council. As disclosed in another published opinion of the Fifth Circuit, the Fifth Circuit Judicial Council has in fact instituted proceedings against Judge McBryde pursuant to § 372(c). *In re McBryde*, 120 F.3d 519, 520 (5th Cir. 1997). As the Court's opinion notes, the bases for the § 372(c) proceeding include the same matters discussed by the Fifth Circuit panel opinion in this case, *i.e.* the *Satz* and *Torres* cases. *Id.* Judge McBryde has vigorously contested the authority of the Council to discipline him under § 372(c) based on disagreement with the merits of his judicial decisions, among other reasons. Nevertheless, the fact that the Council has itself used the § 372(c) process to investigate Judge McBryde's behavior in the *Satz* and *Torres* cases certainly undermines its assertion that the Fifth Circuit opinion deprives it of a "mechanism of judicial governance" that is "critical to the effective administration of the Judicial Branch." Pet. 21.

Third, Petitioners wrongly suggest that commentary in the Rules Governing Complaints of Judicial Misconduct, as promulgated by several circuits to implement § 372(c), contemplate judicial discipline under § 332(d). Pet. 20, n.15. That commentary only suggests that "informal methods of solving problems, traditionally used under section 332" have not been displaced by § 372(c). *See, e.g.*, D.C. Circuit Rules Governing Complaints of Misconduct, Rule 2, Commentary. Judge McBryde does not dispute that judicial councils can undertake to resolve misconduct problems "informally" and

"collegially," *see, e.g., id.*, Rule 20, without resorting to the formal hearing procedures of § 372(c). But here, the Council has rejected a "collegial" resolution, and Judge McBryde is unable, on principle, to consent to the measures taken by the Council. Under those circumstances, the Council may not, under § 332(d), issue significant sanctions, without affording Judge McBryde the hearing and confrontation rights conferred by § 372(c).

Finally, Petitioners suggest that the mechanism of § 372(c) is too cumbersome for judicial councils to deal with the "growing" problem of judicial misconduct. The Congress, in passing § 372(c) to supplement congressional powers of impeachment, instituted these procedures precisely because of the obvious threat to judicial independence that a system without these safeguards would present. H.R. Rep. 96-1313, 96th Cong., 2d Sess. (1980) at 14 ("the potential excesses of a circuit council must be controlled. As a consequence, paragraph (c)(11) requires that minimal due process rights be accorded any judicial officer whose actions or state of health are being investigated by a circuit council. The net effect of this paragraph is that the possibility of one group of federal judges arbitrarily 'ganging up' or 'hazing' another judge is prevented.").[4]

The ramifications of Petitioners' position are astonishing. Not only would it give judicial councils the right to censure a judge without notice or an opportunity to confront the evidence against him, it would also insulate that decision from review from either the courts, Pet. at 22-26, or the

---

[4] Judge McBryde takes the position that § 372(c) is unconstitutional on its face. He does not concede that affording a judge the procedures available in § 372(c) eliminates the threat posed to judicial independence. His position on the constitutionality of § 372(c), however, has no bearing on the statutory scope of § 332—the issue on which Petitioners seek certiorari.

Judicial Conference, which has review authority under § 372(c). 28 U.S.C. § 372(c)(10) (limiting Judicial Conference review to orders issued pursuant to § 372(c)(6)). That it would be easier on judicial councils if they could act without the burden of affording a judge legislatively guaranteed rights and without having to defend their actions in a review proceeding is no reason to grant certiorari.

II.

PETITIONERS' ARGUMENT ABOUT STANDING PRESENTS NO ISSUE WORTHY OF REVIEW

Petitioners' second argument for granting certiorari is based entirely on a breathtaking misreading of this Court's opinion in *Paul v. Davis*, 424 U.S. 693 (1976). Petitioners say that *Paul* holds that injury to reputation does not qualify as injury-in-fact for purposes of Article III standing, and they argue that the Fifth Circuit's recognition of Judge McBryde's standing to challenge the transfer orders is therefore erroneous.

The problem is that *Paul* does not say anything like what Petitioners say it says. Indeed, *Paul* does not address standing or even touch on it at all. What it holds is *not*, as Petitioners suggest, that reputational injury does not confer Article III standing, but only that a reputational injury, without more, does not amount to a deprivation of a *constitutional* entitlement to liberty or property that can support a cause of action for denial of due process. That is, of course, an entirely different issue from injury in fact sufficient to confer Article III standing.[5]

---

[5] Petitioners' claim that Judge McBryde "agreed in the court below that under *Paul*, injury to reputation was not constitutionally sufficient to constitute standing under Article III," Pet. at 24, is equally off the mark. As the actual language quoted in the footnote accompanying this

Indeed, if Petitioners' misreading of *Paul* were correct, no plaintiff could ever bring a defamation claim in a diversity case in federal court, since the reputational injury that the plaintiff sought to redress would not suffice to create a case or controversy within the Article III jurisdiction of the federal courts. Of course, that is not the law.

Even if *Paul* were relevant to standing, it is clear that this is not a case of "mere" injury to reputation as that concept is used in *Paul*. As the Fifth Circuit held, Judge McBryde was not simply the subject of some statement by a governmental body that might tend to injure his reputation; rather, he was subjected to an official "censure" by the Council (Pet. App. 48a), accompanied by the tangible sanction of deprivation of a part of his caseload. Petitioners cite not a single precedent from any source that holds that the subject of an official censure or reprimand does not have Article III standing to mount a legal challenge to that sanction.[6]

Finally, and most importantly, the Fifth Circuit's decision on standing does not turn exclusively, or even principally, on

---

statement demonstrates, what Judge McBryde "conceded" below had nothing to do with Article III standing—all he "conceded" was that under *Paul* an injury to reputation without more could not support a cause of action for denial of due process. *See* Pet. at 24, n.21.

[6] Ironically, Chief Judge Politz, who as chairman of the Judicial Council is at the head of the lead Petitioner, recently wrote an opinion that finds that an attorney has Article III standing to challenge a district court opinion that criticizes him without imposing any sanction on him at all. *Walker v. Mesquite, TX*, 129 F.3d 831 (5th Cir. 1997). The court reached this result by equating the critical statements with an official "reprimand" and reasoning that the attorney's reputational interest in being free from an unwarranted reprimand gave him sufficient injury in fact to confer Article III standing on him. While Chief Judge Politz, in his capacity as head of the Judicial Council, may find it convenient to disavow the opinions he has written as a judge of the United States Court of Appeals for the Fifth Circuit, such inconsistency hardly enhances the persuasive force of the Council's arguments.

reputational injury. The Court's primary holding was that Judge McBryde had standing based on his interest (albeit not a "constitutionally protected property or liberty interest") in "deciding [the *Satz* and *Torres*] cases free from the specter of interference, except by the ordinary process of appellate review." Pet. App. 35a. Petitioners do not challenge this holding in their questions presented, nor does the body of the Petition for Certiorari present any argument that this aspect of the Fifth Circuit's decision on standing was incorrect or otherwise appropriate for review by this Court.[7] Nor do Petitioners muster any arguments that tend to undercut the Fifth Circuit's reliance on *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74 (1970), as indicating that such circumstances give a federal judge Article III standing.[8] Since the Fifth Circuit's analysis is sufficient to support its decision irrespective of reputational injury, Petitioners' arguments, which are solely directed to reputational injury, provide no basis for reviewing the Fifth Circuit's

---

[7] Indeed, the Fifth Circuit's holding in this respect is consistent with this Court's recent discussion of "institutional injury" in *Raines v. Byrd*, 117 S.Ct. 2312 (1997), which the Petition cites for a different point. In *Raines*, this Court held that a purely abstract and hypothetical claim that the "line-item veto" diluted the effectiveness of a Senator's vote did not allege injury in fact under Article III. The Court, however, distinguished its prior holding in *Coleman v. Miller*, 307 U.S. 433 (1939), which recognized an injury and found that legislators had Article III standing where the result of a specific vote they had taken had been nullified. *See* 117 S.Ct. at 2319-20. Here, Judge McBryde had his ability to take actions in two specific cases taken away, and his prior actions in those cases were nullified. Under the reasoning of *Coleman*, as explained in *Raines*, that plainly suffices for standing purposes.

[8] The Fifth Circuit relied on the express discussion of standing in Justice Harlan's concurrence in *Chandler*, 398 U.S. at 106, n.9, but the court could as easily have relied on the majority's decision, which held that mandamus was inappropriate—a holding that necessarily assumed, as an antecedent matter, the existence of an Article III case or controversy.

independently grounded conclusion that Judge McBryde's mandamus action presented a case or controversy within the meaning of Article III.

III.

OTHER REASONS MILITATE IN FAVOR OF THE DENIAL OF THIS PETITION

Judge McBryde's efforts to challenge the Council's October 20 order resulted in a carefully reasoned judgment that recognized the right of every judge to decide cases freely and as he sees fit. If judicial councils were to follow the Fifth Circuit's reasoned judgment, a district judge would be able to conduct his judicial business without fear or concern that a judicial council who disagreed with his decisions could reprimand him for it. And the judgment secures the position of the courts of appeals as the only avenue by which an aggrieved person may seek relief from a district judge's adverse rulings. In short, the Fifth Circuit got it exactly right.

Although the correctness of the decision below is not normally a preeminent factor in this Court's decision whether to grant a writ of certiorari, it is an important consideration in this case, where the sole argument that the decision is sufficiently important to merit review is that the lower court erred. Pet. 25. Forcing Judge McBryde to continue his efforts to defend the judgment and his principles in this Court in and of itself undercuts his independence and further distracts him from his duties as a judge. This factor should give this Court pause in accepting this case for review simply because it may be novel and interesting.

CONCLUSION

For the above-stated reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

WILLIAM H. JEFFRESS, JR.
Counsel of Record
SCOTT L. NELSON
JODY MANIER KRIS
MILLER, CASSIDY,
LARROCA & LEWIN, L.L.P.
2555 M Street, N.W.
Washington, D.C. 20037
(202) 293-6400

DAVID BROILES
KIRKLEY, SCHMIDT & COTTON,
L.L.P.
301 Commerce Street
Fort Worth, Texas 76102
(817) 338-4500

April 27, 1998

Attorneys for Respondent

FILED
MAY 11 1998
CLERK

No. 97-1427

In the Supreme Court of the United States

OCTOBER TERM, 1997

JUDICIAL COUNCIL OF THE FIFTH JUDICIAL CIRCUIT, ET AL., PETITIONERS

v.

JOHN H. MCBRYDE, JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

BARBARA D. UNDERWOOD
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1427

JUDICIAL COUNCIL OF THE FIFTH JUDICIAL CIRCUIT, ET AL., PETITIONERS

v.

JOHN H. MCBRYDE, JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

This unusual mandamus proceeding arises out of a dispute among members of the Judicial Branch, acting in various official capacities, concerning the propriety of a purported reassignment of judicial responsibilities over two cases from one judge to another. Although the United States has a vital interest in the regular, lawful, and effective conduct of judicial business, not least in its capacity as the most frequent litigant before the federal courts, the particular matters at issue on the merits of this petition are preeminently ones of internal organization and management, under statutory guidance, within the

Judicial Branch. Those matters are unrelated to the substantive controversies among the litigants in the underlying proceedings out of which the judicial dispute arose; and although the United States was a party to one of those proceedings, *United States* v. *Satz*, No. 4:94-CR-094-A (N.D. Tex.), litigation of that case on the merits in the district court has now effectively concluded.[1] Indeed, although the United States filed a brief answer to Judge McBryde's mandamus petition in the court of appeals (taking no position on the merits, but urging denial of mandamus primarily on discretionary grounds), it is not clear whether the United States, as such, is actually a party to this mandamus proceeding.[2] Under these

---

[1] The criminal convictions entered in *Satz* have been affirmed on appeal, and this Court has denied associated petitions for review. See *United States* v. *Gray*, 105 F.3d 956 (5th Cir. 1996), cert. denied, 117 S. Ct. 1326, 1856 and 2530 (1997).

[2] The United States was not named as a party to Judge McBryde's mandamus petition, although two U.S. Attorneys, their respective Offices, an Assistant Attorney General, and other federal employees were listed as "interested parties" in accordance with a local rule of court. Pet. for Mandamus 1-3. Fed. R. App. P. 21(a) specifies that when a petition seeks mandamus "directed to a court," "[a]ll parties to the proceeding in the trial court other than the petitioner are respondents for all purposes." On its face, however, Judge McBryde's petition sought mandamus directed, not to a court, but to the Chief Judge of the district court (in that capacity) and to the Judicial Council. See Pet. for Mandamus Cover, 9, 11, 13, 39. The court of appeals concluded that it lacked jurisdiction to issue such a writ to the Council in this case (Pet. App. 31a), but that it had jurisdiction to issue the writ to Chief Judge Buchmeyer, in his capacity as an "officer[ ] of the Northern District of Texas" (*id.* at 33a-36a).

The listing of counsel in connection with the reported opinion of the court of appeals incorrectly identifies Justice Department attorneys as counsel for Chief Judge Buchmeyer and

circumstances, we are reluctant to offer extensive uninvited comment, at the petition stage, on a controversy largely internal to a coordinate Branch of the government.

There is, however, one unique procedural issue that arises at this stage of the proceedings and that necessarily involves not only the Executive Branch, but this Office. The named petitioners in this Court are the Judicial Council of the Fifth Judicial Circuit and the Honorable Jerry Buchmeyer, in his official capacity as Chief Judge of the United States District Court for the Northern District of Texas. While the Judicial Council is an entity created by statute as an administrative arm of the Judicial Branch (see 28 U.S.C. 332), and the Chief Judgeship held by Judge Buchmeyer is a statutory office within that Branch (see 28 U.S.C. 136), both are clearly part of the government of the United States.

Section 518(a) of Title 28 of the United States Code provides that, "[e]xcept when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court * * * in which the United States is interested." The Attorney General has in turn delegated that authority and responsibility for "[c]onducting, or assigning and supervising, all Supreme Court cases, including * * * petitions for * * * certiorari," to the Solicitor General, acting "in consultation with each agency or official concerned." 28 C.F.R. 0.20. Congress may, of course, override the general assignment of respon-

---

other individual respondents to the mandamus petition. See *In re McBryde*, 117 F.3d 208, 209 (5th Cir. 1997). In fact, those attorneys appeared in the mandamus proceeding only on behalf of the United States as such.

sibility to the Solicitor General by specifically conferring on other governmental entities the authority to litigate in this Court. *United States* v. *Providence Journal Co.*, 485 U.S. 693, 705 n.9 (1988). This Court has made clear, however, that in the absence of such a specific statutory provision, the authority conferred by Section 518(a) to "conduct and argue" cases in this Court on behalf of federal governmental entities is exclusive as to any case "in which the United States is interested." *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 92-93 (1994); *Providence Journal*, 485 U.S. at 699-700.

In *Providence Journal*, this Court held that the United States was "interested," within the meaning of 28 U.S.C. 518(a), in a case in which a federal district court had appointed a private attorney to prosecute a criminal contempt, even though the matter was initiated at the direction of the district court and was "brought to vindicate the authority of the Judiciary and to punish disobedience of a court order." 485 U.S. at 707-708. The Court specifically rejected the argument, advanced by the Solicitor General, that Section 518(a) addressed only the question of authority to represent the interests of the Executive Branch. *Id.* at 701. Indeed, the Court found "somewhat startling" the proposition that, for these purposes, there could be "more than one 'United States' that may appear before this Court." *Ibid.*

Providence Journal calls into serious question petitioners' authority to bring their case to this Court without having received timely authorization from the Solicitor General.[3] Neither petitioner has

---

[3] In *Chandler* v. *Judicial Council of the Tenth Circuit*, 398 U.S. 74 (1970), the Solicitor General initially represented the

sought or received such authorization. Nor is there any evident ground to argue that Congress has conferred on either petitioner the sort of independent statutory authority that would be required to override Section 518(a) if it is otherwise applicable. See *Providence Journal*, 485 U.S. at 705 n.9; *FEC*, 513 U.S. at 93-98; compare 28 U.S.C. 332(d)(2) (authorizing a judicial council to institute a contempt proceeding in district court to enforce compliance with council orders).

This threshold jurisdictional issue may be a factor weighing against discretionary review in this case. If, however, the Court grants the petition for a writ of certiorari, it is respectfully submitted that the Court should request the parties to address the question whether petitioners may petition for certiorari without having received authorization from the Solicitor General.

BARBARA D. UNDERWOOD
Acting Solicitor General[*]

MAY 1998

Judicial Council in responding to Judge Chandler's filings in this Court (see *id.* at 79, 81), but when the case was briefed and argued on the merits, the Judicial Council was represented by private counsel and the Solicitor General filed a brief on behalf of the United States as amicus curiae supporting the Council (see *id.* at 75). In that amicus brief (at 1 n.*), the Solicitor General explained that he "ha[d] determined, pursuant to 28 U.S.C. 516 and 518 (Supp. IV), that since federal officers are both the petitioner and the respondent in this case, the United States should appear as *amicus curiae*, not as counsel for either party." The briefs do not disclose whether Judge Chandler received more specific authorization from the Solicitor General to file his mandamus petition.

[*] The Solicitor General is disqualified in this case.

(4)

Supreme Court, U.S.
FILED
MAY 20 1998
OFFICE OF THE CLERK

No. 97-1427

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

JUDICIAL COUNCIL OF THE FIFTH JUDICIAL CIRCUIT AND JERRY BUCHMEYER, CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS,

Petitioners,

v.

JOHN H. MCBRYDE, DISTRICT JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

THOMAS B. ALLEMAN

WINSTEAD SECHREST & MINICK P.C.
5400 Renaissance Tower
1201 Elm Street
Dallas, Texas 75270
(214) 745-5103

Counsel for Petitioner Jerry Buchmeyer, Chief Judge of the United States District Court for the Northern District of Texas

ROBERT B. FISKE, JR.
Counsel of Record
LOWELL GORDON HARRISS

DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, N.Y. 10017
(212) 450-4000

Counsel for Petitioner The Judicial Council of the Fifth Judicial Circuit

May 20, 1998

14 pp

TABLE OF CONTENTS

PAGE

Table of Authorities ii

I. Respondent's Re-interpretation of the Decision Below Does Not Eliminate the Conflict with the Contrary Decisions of this Court 1

II. The Suggestion of the Acting Solicitor General That Section 518(a) Applies to Litigation Within the Article I or Article III Branches or Between Branches Is Unsupportable 3

CONCLUSION 9

TABLE OF AUTHORITIES

Cases

	PAGE
Bowsher v. Synar, 478 U.S. 714 (1986)	8
Buckley v. Valeo, 424 U.S. 1 (1976)	8
Chandler v. Judicial Council of the Tenth Circuit of the United States, 398 U.S. 74 (1970)	8
Dalton v. Specter, 511 U.S. 462 (1994)	8
Federal Election Commission v. NRA Political Victory Fund, 513 U.S. 88 (1994)	3, 4, 5
Goldwater v. Carter, 444 U.S. 996 (1979)	8
Gravel v. United States, 408 U.S. 606 (1972)	8
Hayburn's Case, 2 U.S. 408 (1792)	6
Humphrey's Executor v. United States, 295 U.S. 602 (1935)	9
INS v. Chadha, 462 U.S. 919 (1983)	8
Mistretta v. United States, 488 U.S. 361 (1989)	9
Packwood v. Senate Select Comm. on Ethics, 510 U.S. 1319 (1994)	8
Raines v. Byrd, 117 S. Ct. 2312 (1997)	8
Richardson-Merrell, Inc. v. Koller, 472 U.S. 424 (1985)	2
United States v. Providence Journal Co., 485 U.S. 693 (1988)	3, 4, 5
Will v. United States, 389 U.S. 90 (1967)	8

PAGE

Statutes & Rules

28 U.S.C. § 332 (1993) 1, 2, 3
28 U.S.C. § 372 (1993) 2
28 U.S.C. § 516 (1993) 5
28 U.S.C. § 518 (1998) ..... *passim*
Act of Jan. 31, 1928, ch. 14 § 1, 45 Stat. 54 7
An Act to enact title 5, United States Code, Pub. L. 89-554, § 518, 80 Stat. 613 (1966) 7
An Act to Establish the Department of Justice, ch 150, 16 Stat. 162 (1870) 6
An Act to Establish the Judicial Courts of the United States, ch. 20, § 35, 1 Stat. 73, 92-93 (1789) 5
Customs Court Act of 1980, Pub. L. 96-417, Title V, § 503, 94 Stat. 1743 7
R.S. § 359 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

JUDICIAL COUNCIL OF THE FIFTH JUDICIAL CIRCUIT AND JERRY BUCHMEYER, CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS,
Petitioners,

v.

JOHN H. MCBRYDE, DISTRICT JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

Petitioners respectfully submit this Reply Memorandum primarily addressing the profoundly disturbing proposition advanced as a suggestion in the Memorandum for the United States ("U.S. Mem.").

I. Respondent's Re-interpretation of the Decision Below Does Not Eliminate the Conflict with the Contrary Decisions of this Court.

First, in this Brief in Opposition ("Br. Opp."), Respondent attempts to suggest that the decision of the Court of Appeals did not limit the authority of circuit judicial councils to remedy judicial misconduct pursuant to 28 U.S.C. § 332 (1998) (Br. Opp. 7), but the Court of Appeals' decision specifically provides that "[w]hile § 332 grants the judicial councils some authority to deal with judicial misconduct, *the Judicial Coun-*

cil's authority to impose discipline based on its finding of misconduct is limited to that power conferred by § 372(c)." (Petition for Writ of Certiorari ("Cert. Pet.") 46a; emphasis supplied.)

Second, although Respondent contends that there is an alternative and unchallenged holding in the Court of Appeals' decision which supports the decision regardless of the interpretation of Section 332, none is apparent.

Third, Respondent (who relies upon the decision below construing Section 372(c) even though he contends in this Court that the statute is unconstitutional, Br. Opp. 15 n.4) asserts that the decision below was not contrary to this Court's numerous decisions involving statutory construction, especially "implied repeals," because Section 372 and Section 332 were in effect adopted simultaneously. This suggestion is refuted by the legislative evolution from 1939 to 1990 set forth in the Petition, as well as the Court of Appeals' statements that Section 372 "limit[s]" or "eliminate[s]" the power of the circuit councils to discipline judges under Section 332. (Cert. Pet. 46a, 52a.)

Fourth, Respondent argues that the decision below does not conflict with *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985), because the relevant passage is supposedly dicta, a position not taken by the Court of Appeals, which acknowledged that it supports Petitioners' position. (Cert. Pet. 46a.)

Finally, Respondent's attempts to demonstrate Article III standing (to challenge the order transferring two cases because his reputation was supposedly injured) are unavailing, nor is any justification advanced for the creation of this species of litigation within the Judicial Branch.

In the end, contrary to Respondent's suggestion (Br. Opp. 13-16), the decision of the Court of Appeals will have pernicious

consequences to the effective administration of justice. This decision cuts off the authority of a circuit council to address judicial misconduct under Section 332 and confers Article III standing on a district judge to initiate litigation against a circuit council despite the clear requirement of Section 332(d)(2) that "[a]ll judicial officers and employees of the circuit shall promptly carry into effect all orders of the judicial council." 28 U.S.C. § 332(d)(2). By so tying the hands of circuit judicial councils, the Court of Appeals' decision ultimately makes intervention into the process of judicial governance by the coordinate Branches more likely, thereby threatening the principle of judicial independence.

II. The Suggestion of the Acting Solicitor General That Section 518(a) Applies to Litigation Within the Article I or Article III Branches or Between Branches Is Unsupportable.

The Acting Solicitor General takes no position on the merits of this dispute. She justifies taking no position precisely because the dispute is one within "a coordinate Branch of the government." (U.S. Mem. 3.) Nevertheless, this Article II officer suggests that 28 U.S.C. § 518(a) (1998) applies to this case, exclusively involving Article III persons. Petitioners' concerns are heightened by the alternative dispositions that the Acting Solicitor General advances: request briefing of Section 518(a) issues if certiorari is granted, or consider Section 518(a) as a factor in denying certiorari. The former appears to be inconsistent with some recent "Branch litigation," and the latter is inconsistent with the dispositions in *United States v. Providence Journal*, 485 U.S. 693 (1988) and *FEC v. NRA Political Victory Fund*, 513 U.S. 88 (1994).

But the Office of the Solicitor General cannot be said to be disinterested on this issue. There is a "Greeks bearing gifts"

quality to the Memorandum: it overtly foregoes a lesser power (to comment on the merits of this particular case), while covertly asserting an infinitely greater and, we submit pernicious, power — the absolute, institutional control of Article III (and Article I) persons' access to this Court in, and this Court's ability to address, inter-Branch and intra-Branch litigation. To the best of our knowledge, the Office of the Solicitor General has never before surfaced the suggestion that it has this power over these classes of cases, despite opportunities to do so both before and even after *Providence Journal* and *FEC*. Petitioners (all Article III judges) respectfully submit that any suggestion that this Court's ability to hear inter-Branch or intra-Branch litigation may be subject to the unreviewable discretion of one Article II officer is of profound importance.

Section 518(a) is simply not applicable in the context of intra-Branch or inter-Branch litigation. The present dispute is between, on the one hand, an Article III administrative body composed of nineteen Article III judges with supervisory authority over a judicial circuit and one Article III district court judge with supervisory and administrative authority, and on the other hand, an Article III judge in his official capacity. The conclusion that Section 518(a) is inapplicable is consistent with both the reasoning of the Court in *Providence Journal* and *FEC* and the legislative genesis of the current Section 518(a). Moreover, the suggestion that Section 518(a) might be interpreted to make Article I or Article III persons or entities dependent upon the largess of an Article II officer before a matter could be brought to this Court raises serious constitutional questions of separation of powers.

In *Providence Journal* and *FEC*, this Court applied Section 518(a) in criminal and civil actions to enforce laws of the United States. In both cases, the "United States" as broadly defined was on one side of the dispute and a private party was

on the other. In such litigation with private parties, *Providence Journal* and *FEC* stand for the sensible and simple proposition that there is only "one 'United States' that may appear before this Court." *Providence Journal*, 485 U.S. at 701.

In this matter, in contrast, both petitioners *and* respondent are before this Court in their official governmental capacities. Both are, in the broadest practical and constitutional senses, the "United States." Simply put, the "United States" is on both sides of the "v." in this matter.

The intra-Branch nature of this matter simply takes this case outside of the scope of Section 518(a). Indeed, it is fair to observe that the Court held that Section 518(a) applies *only* where there is "one 'United States' that may appear before this Court," *Providence Journal*, 485 U.S. at 701, not where, as here, there are two "United States" from different Branches or within a single Branch.

The legislative genesis of Section 518(a), which this Court left unexplored in *Providence Journal* and *FEC*, also does not remotely suggest that Congress intended that the Attorney General control this Court's access to inter-Branch or intra-Branch litigation. The ultimate origin of what is now Section 518(a) is found in Section 35 of the Judiciary Act of 1789.

> "*And there shall also be appointed a meet person, learned in the law, to act as attorney general for the United States . . . whose duty it shall be to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned*, and to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments . . . ."

The Attorney General's job was simply to advise the President and Cabinet officers and, when suits in the Supreme Court required the presence of the United States, to act as the Federal government's lawyer. There is nothing in the language remotely suggesting, we submit, that the First Congress even contemplated inter-Branch or intra-Branch litigation, much less intended that the Attorney General would control access by the Legislative or Judicial Branches to this Court in such cases. Indeed, we note that the statute preceded by three years what might be called the first separation of powers case, *Hayburn's Case*, 2 U.S. 408 (1792).

The evolution of Section 35 to what is now Section 518(a) provides no indication that Congress intended that the Attorney General control all intra- and inter-Branch litigation. In 1870, Congress created the United States Department of Justice. Section 2 of this Act created the office of the Solicitor General, and Section 5 of this Act provided for delegation of work from the Attorney General to the Solicitor General. Section 5 also provided that the Attorney General and the Solicitor General would argue any case in which "the government is interested" in the Court of Claims, and in appeals from the Court of Claims to the Supreme Court to argue them in this Court "as in other cases in which the United States is interested." Congress did not intend by this Act to expand or alter the role of the Attorney General in cases before the Supreme Court not coming from the Court of Claims, but simply referred back to those powers already set out in the Judiciary Act of 1789.

In 1873, Congress consolidated the prior legislation relating to the authority of the Attorney General and the Solicitor General in R.S. § 359, which read as follows:

> "Except when the Attorney General in particular cases otherwise directs, *the Attorney General and Solicitor-*

> *General shall conduct and argue suits and writs of error and appeals in the Supreme Court* and suits in the Court of Claims *in which the United States is interested* . . . ."

There is nothing in the legislative history of this provision to indicate any intention on the part of Congress that its enactment would give the Attorney General or Solicitor General authority to control inter- or intra-Branch litigation in this Court.

The provision underwent several other minor amendments over the next hundred years. A 1928 Act removed the reference to "writs of error."[1] In 1966, the present structure of Section 518 was adopted, with two parts: 518(a), which concerns this Court, and 518(b), which deals with intervention by the Attorney General in cases where United States interests require it.[2] Various courts were added as the court structure of the United States changed.[3] But the basic structure has remained the same since 1789. At no point from its humble origin in 1789 to its current incarnation as Section 518(a) did the statutory language or legislative context remotely suggest the actual congressional intention to make inter- or intra-Branch litigation in the Supreme Court subject to the control of the Attorney General.

The present dispute between petitioners and respondent is a dispute between entities within Article III. The suggestion is made that the statute requires that petitioners, Article III entities, obtain permission of an Article II official before they

---

[1] Act of Jan. 31, 1928, ch. 14 § 1, 45 Stat. 54.

[2] *See* An Act to enact Title 5, United States Code, Pub. L. 89-554, § 518, 80 Stat. 613-14 (1966).

[3] *See, e.g.*, Customs Court Act of 1980, Pub. L. 96-417, Title V, § 503, 94 Stat. 1743 (1980) (adding "Court of International Trade").

may request this Court to correct an error of an Article III court. Petitioners emphasize that this suggestion itself raises substantial separation of powers concerns.

Only in recent decades have substantial numbers of intra-Branch and inter-Branch disputes, many involving separation of powers issues, been decided by this Court. In those cases, as in this, the "United States" was on both sides of a concrete, deadly serious, and important dispute usually of lasting constitutional significance. Yet there was not the slightest indication or even suggestion that the Attorney General had, by virtue of Section 518(a), absolute control over access to this Court (although he or she may have represented one party).[4]

To suggest that Section 518(a) may be construed to apply to intra- or inter-Branch litigation is to suggest that absolute discretion be devolved on one Article II officer to dictate whether a petition for certiorari may be filed by an Article III (or Article I) person. In effect, the Attorney General could pick the winner in any such dispute. That power, of awesome significance to our system of government, deserves far more open and explicit justification than the suggestion by the potential recipient thereof.[5]

---

[4] *See, e.g., Raines v. Byrd*, 117 S. Ct. 2312 (1997); *Dalton v. Specter*, 511 U.S. 462 (1994); *Packwood v. Senate Select Committee on Ethics*, 510 U.S. 1319 (1994); *Bowsher v. Synar*, 478 U.S. 714 (1986); *INS v. Chadha*, 462 U.S. 919, 939 (1983); *Goldwater v. Carter*, 444 U.S. 996 (1979); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Gravel v. United States*, 408 U.S. 606 (1972); *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74 (1970); *Will v. United States*, 389 U.S. 90, 91-93 (1967).

[5] Moreover, the consequences of such an application of Section 518(a) could extend beyond cases before this Court and extend to *all* Article III courts. The same language used in 28 U.S.C. § 518 — "United States is interested" — also appears in 28 U.S.C. § 516 (1993).

Subjecting Article I and Article III persons and entities to the absolute control of an Article II officer in litigation within Article III and with other Branches would raise substantial separation of power concerns. The Constitution "mandates" that each Branch of government remain "entirely free from the control or coercive influence, direct or indirect, of either of the others . . . ." *Mistretta v. United States*, 488 U.S. 361, 380 (1989) (quoting *Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935)). Subordinating the Judicial Council, composed as it is of nineteen Article III judges, and Petitioner Buchmeyer to the absolute authority of the Attorney General and Solicitor General in the context of an intra-Branch dispute involving another Article III judge would create a comparable constitutional problem.

CONCLUSION

The issues presented in the Petition are of substantial importance to the Judicial Branch. As the Judicial Branch continues to grow in numbers, responsibilities, and complexity, the authority of circuit judicial councils to remedy judicial misconduct will similarly grow in significance. The continued ability of the Judicial Branch to govern itself is of undisputed importance. This Court often waits for the development of unequivocal conflicts between circuits or what may be viewed as ideal factual contexts before addressing some areas of the law. The matters raised in the present Petition are of central and ongoing significance to the administration of the Judicial Branch and should be addressed now, in the best interests of this Branch.

The Court should not decline to review of the Petition because of the new issue injected into this case by the Acting Solicitor General. We do not deny the interpretation of Section 518(a) suggested by the Acting Solicitor General is deeply

troubling, if not potentially insidious. But the addition of another issue of importance to the Judicial Branch should not cause this Court to avoid either issue. Petitioners, as Article III judges, request that this Court reject the suggestion that the authority of the Office of the Solicitor General should be *implicitly and incrementally* enhanced through the discretionary denial of certiorari. This issue, of importance to persons and entities within both Article III and Article I Branches, should be confronted and addressed frankly and openly.

Dated: New York, New York
May 20, 1998

Respectfully Submitted,

THOMAS B. ALLEMAN

WINSTEAD SECHREST & MINICK P.C.
5400 Renaissance Tower
1201 Elm Street
Dallas, Texas 75270
(214) 745-5103

Counsel for Petitioner Jerry Buchmeyer, Chief Judge of the United States District Court for the Northern District of Texas

ROBERT B. FISKE, JR.
Counsel of Record
LOWELL GORDON HARRISS

DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, N.Y. 10017
(212) 450-4000

Counsel for Petitioner The Judicial Council of the Fifth Judicial Circuit